Supreme Court, U.S.
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No. 02-_____

IN THE

# Supreme Court of the United States

LOUIS SCHNEIDER,

*Petitioner,*

*v.*

COUNTY OF SAN DIEGO and
GREGORY REYNOLDS, dba REYBRO, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly held, in conflict with other circuits that have decided the question, that in ruling on a motion for statutory attorneys' fees in an adversarial setting a district court may disregard uncontroverted evidence on the actual historical market rates of the timekeepers' services and on the actual number of hours reasonably expended on the matter.

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## PETITION FOR A WRIT OF CERTIORARI

Louis Schneider respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Court of Appeals' decision denying rehearing (App. 6a) is unreported. Its decision on the merits (App. 1a-5a) is unreported, and is reproduced at 2002 U.S. App. LEXIS 4999 (9th Cir. Mar. 21, 2002). The decisions of the district court regarding attorneys' fees and expenses that were the subject of the appeal (App. 7a-102a) are unreported.

## JURISDICTION

The decision of the court of appeals was entered on March 21, 2002. A timely petition for panel rehearing and rehearing en banc was denied on May 16, 2002. App. 6a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988 provides in relevant part:

**§ 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees.**

* * *

**(b)** In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the

prevailing party, other than the United States, a reasonable attorney's fee as part of the costs

. . . .

## STATEMENT OF THE CASE

This is a takings and procedural due process lawsuit brought by petitioner Louis Schneider pursuant to 42 U.S.C. § 1983 and 1988 against respondent County of San Diego ("the County") and its independent contractor, respondent Gregory Reynolds, dba Reybro, Inc. ("Reynolds"). The district court had subject-matter jurisdiction under 28 U.S.C. § 1331.

After Schneider prevailed in the litigation the district court, in ruling on his motions for attorneys' fees and expenses, disregarded uncontroverted evidence on the actual historical market rates of the timekeepers' services and on the actual number of hours reasonably expended on the case. The district court slashed these historical rates by approximately half and awarded zero hours for a major phase of work on the case. The district court made these rulings despite Schneider's objection that doing so would be contrary to this Court's interpretation of 42 U.S.C. § 1988 and square authority from other circuits, particularly the Third Circuit. The court of appeals, bound by past precedent, held in an unpublished decision that the district court was free to disregard such evidence even in an adversarial setting where the fee opponent did not controvert the evidence.

The decision below conflicts with decisions of this Court and of other circuits in the frequently litigated area of Section 1988 attorneys' fees. These decisions emphasize the objective, market-oriented, record-based nature of the "lodestar" method, which replaced the subjectivity of the earlier multi-factor approach to fees, streamlining and lending greater predictability to statutory fee litigation. This case provides an ideal vehicle for this Court to restore consistency to the procedural framework of Section 1988 fee litigation.

**The Merits Litigation**

Schneider's lawsuit resulted from respondents' destruction of thirteen motor vehicles owned by Schneider in 1989. The vehicles (nine buses, two motor homes, and two automobiles) were parked on a 1.4-acre parcel of land owned by Schneider in rural San Diego County. The land was zoned for agricultural use only. After a hearing, the County Abatement Board concluded that the vehicles presented a zoning violation under San Diego County Zoning Ordinance §§ 1006 and 6799, which prohibit the parking of commercially registered vehicles in agricultural areas, and that this zoning violation constituted a public nuisance. *Schneider v. County of San Diego*, 28 F.3d 89, 90-91 (9th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995).

Schneider was ordered to abate the nuisance by removing the vehicles from his property within 30 days, or else County officials would "do or cause to be done whatever work is necessary to abate the public nuisance." When Schneider failed to move the vehicles within 30 days, the County abated the nuisance by hiring Reynolds to tow and destroy them. The vehicles were towed, and Schneider was permanently deprived of them, on December 21, 1989. *Id.* at 91.

In 1990 Schneider filed suit in the U.S. District Court for the Southern District of California ultimately alleging, among other things, that he was deprived of his property in violation of the takings clause (as destroying the vehicles was an irrationally extreme means of abating the nuisance posed by their location), and in violation of procedural due process (as no one had given Schneider notice that if he failed to move the vehicles they would be destroyed, rather than towed and stored at his expense). *Id.* at 92-93.

Following extensive discovery and motion practice, in 1992 the district court granted summary judgment against Schneider on all counts. Schneider appealed. In 1994, the court of appeals reversed the grant of summary judgment on Schneider's takings and procedural due

process counts, and on several other counts, and remanded the case for trial. *Id.* at 92-93.

Following further discovery and extensive motion practice by both sides, a four-day trial was held in 1995. At the close of all the evidence, Schneider moved for judgment as a matter of law on the takings count and the procedural due process count on the basis that it was irrational for the County to have destroyed his thirteen vehicles as its method of abating the nuisance posed by their location, and that he was never given notice of the County's extreme method of nuisance abatement. The district court denied the motion. The jury ruled against Schneider on all counts.

Schneider again appealed. In 1998, the court of appeals agreed with Schneider that no rational juror could find against him on his takings and procedural due process counts, and that he was therefore entitled to judgment as a matter of law. *Schneider v. County of San Diego*, 1998 U.S. App. LEXIS 8207, *2-*9 (9th Cir.), *cert. denied*, 525 U.S. 1003 (1998). The court of appeals remanded the case "with instructions to grant the motion and determine damages." *Id.* at *2.

On remand, Schneider restricted his claim for actual damages to his entitlement under the takings count to the fair market value of his thirteen vehicles on the date of their taking in 1989, plus constitutionally mandated prejudgment interest on that sum to compensate him for the delay in payment of fair market value. ER 260-65, 289-91, 346-47. (The eight-volume Excerpts of Record filed by Schneider in the court of appeals are referenced "ER __.") The parties settled the fair market value of four of the vehicles, and a jury trial held on January 21 and 26, 1999, resolved the 1989 fair market value of the remaining nine vehicles. ER 297, 300, 349-50. On March 30, 2000, the district court entered final judgment in the amount of $67,795.50 as the fair market value of the thirteen vehicles, plus $34,145.54 in prejudgment interest, for a total of $101,941.04. ER 1621-22. The district court rejected Schneider's request

for nominal damages on his procedural due process count. ER 260-67, 359, 364, 900-03.

Schneider again appealed, arguing that the district court had committed legal error in its framework for calculating prejudgment interest and in its refusal to award nominal damages on the procedural due process count. The court of appeals again reversed the district court, remanding the case for a redetermination of prejudgment interest under a proper legal standard and directing the district court to award nominal damages on Schneider's procedural due process claim. *Schneider v. County of San Diego*, 285 F.3d 784 (9th Cir. 2002).[1]

**The Interim Fee Motion**

The approximately $102,000 obtained by Schneider as the fair market value of his vehicles, adjusted for delay in payment, is more than ten times the highest settlement offer ever made by Reynolds. ER 766-67 ¶ 4. The County never made any settlement offer, and the amount recovered by Schneider is 100,000 times the cap the County urged as the maximum Schneider should recover. *See* ER 525 ("Our argument was, is, and now forever will be that Mr. Schneider . . . [is] not entitled to the value of the buses at all. He's only entitled to one dollar damages period."). Having thereby been forced to litigate to finality, pursuant to 42 U.S.C. § 1988 Schneider sought an award of attorneys' fees and expenses for all the work done by Schneider's counsel over the course of a decade to overcome the tenacious resistance of the County and Reynolds and the adverse rulings of the district court. See also note 6, *infra*.

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[1] That remand is in progress. It concerns issues wholly separate from issues regarding attorneys' fees addressed in the court of appeals' decision below and posed by this petition.

Schneider's interim fee motion was filed a year before the entry of final judgment.[2] The interim fee motion covered the first nine years of work on the case. As to the number of hours worked, after exercising substantial billing judgment that significantly reduced the hours claimed, *see* ER 385 ¶13, 561 ¶16, 736, 767-68 ¶6, 835-36, Schneider included in the "lodestar" request 2250 hours of work by twelve timekeepers (2111.46 lawyer hours, 59.85 paralegal hours, and 78.7 law student hours), supported by 125 pages of detailed time records. ER 381, 383-84, 414-87, 561-62, 573-623, 951-52. In their opposition papers, the County and Reynolds asserted objections to 63% of the hours claimed. ER 648-58, 674-87, 1086-87, 1867 ¶ 23, 1907. Schneider's counsel filed detailed declarations rebutting these assertions. ER 763-70, 808-25, 837-91. The district court upheld 93% of the hours claimed, finding that Schneider's counsel and their support personnel reasonably spent a total of 2091 hours on this litigation between 1990 and the filing of the interim fee motion on March 29, 1999. App. 13a. No party appealed from this ruling.

Schneider also included in the lodestar request $46,230.12 in out-of-pocket expenses incurred by his counsel. ER 385, 562. In their opposition papers, the County and Reynolds asserted objections to many of the

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[2] Schneider filed the interim fee motion on March 29, 1999, within the 60-day period set by the district court at the close of the trial on fair market value, on January 26, 1999. *See* ER 345-48, 350 ("you're to . . . file your motion for attorneys' fees . . . in 60 days). The 60th day after January 26, 1999, was Saturday, March 27, so that under Fed. R. Civ. P. 6(a) the due date for the motion was the next business day, Monday, March 29, the date the motion was filed. After the interim motion was timely filed as directed by the district court, the district court indicated that it thought it had set a 60-day deadline for the motion to be heard, but that its actual intent was now irrelevant. *See* ER 496 ("I was under the impression it was [a] date to hear. . . . In any event, we'll give the defense time to respond.").

expenses. ER 654-58, 682-87. The district court upheld 98% of the expenses claimed, totaling $45,217.95. App. 78a-81a. No party appealed from this ruling.

The only aspect of Schneider's interim fee motion still at issue is his request that the lodestar be calculated using the same hourly market rates at which the services of ten of the timekeepers were historically billed and collected by Schneider's counsel on other cases between 1990 and 1999, with these rates adjusted upward to reflect the delay in payment using the lowest interest rate historically charged in the California legal market for extended delay in payment, 10% simple interest.[3]

As to hourly rates, through declarations filed in support of his interim fee motion Schneider proved that for these ten timekeepers, Schneider was seeking *the same* hourly rates at which their time was historically billed and collected on other cases at the same time the services were being rendered on this case. ER 382-83, 559-60, 918-19. In addition to proving the historical actual hourly rates for each timekeeper, Schneider proved that these actual hourly rates were well within the normal and reasonable range of hourly rates in the California legal market (which was proven to be the relevant market), including San Diego. ER 382-85, 400, 407, 411, 560, 569, 572, 766, 772-73, 785, 834, 1098-1103, 1110-14, 1121-26, 1129-31, 1135-41, 1150-51, 1153-55, 1158, 1168-70, 1376-77, 1380-89, 1397-98, 1402-05, 1407-38.

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[3] Twelve different timekeepers performed services on behalf of Schneider, but the hourly rate for two of them is no longer at issue. One of Schneider's counsel did not have an established historical hourly rate during the 1990-99 time period, and Schneider did not appeal from the district court's determination, based on a comparison of rates charged by other lawyers, of a reasonable hourly rate for his services. *See* Brief of Appellant at 19 n.5; App. 60a. As to a second timekeeper, a paralegal, the district court accepted the requested historical market rate of $60/hour. ER 383 ¶7, 1075-76.

Schneider's evidence of the actual market rates that had historically been paid for the work of these ten timekeepers was not controverted in the opposition to the interim fee motion filed May 18, 1999, by the County and Reynolds. ER 645-47, ER 672-74. Indeed, that opposition did not even mention nine of the ten timekeepers, much less question their customary hourly rates or argue that the rates were unreasonable.[4]

Attached to the opposition were several pieces of evidence indicating what other attorneys of varying experience and specialization had charged in other cases. ER 645-47, 672-74, 701-33. Much of this evidence further buttressed the reasonableness of the hourly rates used in Schneider's interim fee motion. For example, this evidence indicated that average attorney billing rates in San Diego range between $150 to $250 per hour. ER 645-47, 672-74. The historical billing rates of three attorneys who worked on this case, who together put in two-thirds of the hours on this case, were at or below *the low end* of this range. One was billed out at $125/hour, one was billed out at $150/hour, and one was billed out at $175/hour. ER 951-52. As a further example, the evidence submitted with the fee opposition proved an average paralegal billing rate in San Diego of $80/hour. ER 704. The historical paralegal billing rate used in Schneider's fee motion was $15/hour less than that. ER

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[4] As revealed by the County's own filings in this case, in opposition to a fee motion in an earlier case the County had rebutted the hourly rates sought in the motion by filing the declaration of a qualified litigation attorney who had reviewed the movant's evidence and set forth under oath that the specific lawyers who served as plaintiff's counsel "have never truly developed a 'market rate,'" as "their fees are rarely paid by their clients," and that the hourly rates claimed in the fee motion were much greater than the hourly rates that these specific lawyers could "command on a regular basis in the open market." ER 646, 710, 715-18. No such declaration was filed in this case. Indeed, in oral argument on the fee motion in this case counsel for the County indicated that he had not found an attorney willing to submit a declaration critical of Schneider's interim fee motion. ER 1008.

559-60 ¶¶ 11-13, ER 952. Even for legal research and drafting work by law students, the fee motion requested $85/hour, slightly above the average rate for paralegal work proved by respondents. ER 559-60 ¶¶ 11-13.

In addition to seeking a fee award calculated using the actual market rates that had historically been paid for the work of these ten timekeepers, Schneider sought an upward adjustment to these historical rates to reflect the fact that these historical rates were predicated on prompt payment, not payment years after the rendering of the services. Schneider's counsel surveyed the California legal marketplace and submitted multiple declarations proving that during the pendency of this case, California law firms, including San Diego law firms, have charged and collected between 10% and 18% annual interest for extended delay in payment. ER 408, 562-65, 570, 761-62, 1171-74, 1377-78. To remove any room for argument about the appropriate interest rate, Schneider's interim fee motion requested that the historical rates of the ten timekeepers be adjusted upward by 10% (uncompounded) for each year of delay in payment, using the lowest interest rate for delay in payment charged in the California legal marketplace. ER 562, 1171. Schneider's evidence of the California legal market's interest rate for delay in payment was not controverted with evidence of any other interest rate actually used in the California legal market, in the opposition to the interim fee motion filed May 18, 1999, by the County and Reynolds. ER 658-60, 687-89.

Despite the uncontroverted evidence on Schneider's interim fee motion that the hourly rates sought were the actual hourly rates historically paid for the services of these ten timekeepers and that the delay multiplier sought was based on the lowest interest rate actually charged in the California legal marketplace for delay in payment, the district court refused to award fees based

on these uncontroverted market rates.[5] It slashed by roughly half the hourly rates sought. App. 60a-74a. For example, the customary $125/hour and $150/hour rates for two attorneys who did much of the research and drafting work in this case were reduced to $75/hour, *see* App. 23a-25a, 67a-69a — less than the $80/hour *paralegal rate* in San Diego proved by defendants' own evidence. ER 704. The $65/hour sought for paralegal work, itself $15/hour below the San Diego average, was cut to $30/hour. ER 559-60; App. 72a.

The district court likewise refused to award a delay multiplier based on the uncontroverted evidence of the actual interest rates for delay in payment charged in the California marketplace. Instead of awarding 10% simple interest from the date the services were rendered, the lowest amount charged in California for extended delay in payment, the district court awarded no interest for the delay in payment for work done between 1995 and 1999; awarded less than half the market interest rate for the work between 1991 and 1995; and even on this work began the running of interest not as the services were rendered between 1991 and 1995, but only beginning in 1995. App. 29a-30a, 77a-78a.[6]

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[5] Schneider repeatedly urged the district court that pursuant to this Court's decisions construing 42 U.S.C. § 1988 as explicated in various circuit court decisions, this uncontroverted evidence of actual market rates was controlling on a fee motion. See pp. 26-28, *infra.*

[6] In a final aspect of its ruling on the interim fee motion, one not relevant to this petition, the district court granted the request of the County and Reynolds for a downward adjustment to the lodestar to account for the fact that Schneider did not prevail on all of the counts in his complaint, and against all the defendants he initially named. *See* ER 641-44, 668-71; App. 75a-77a. Schneider appealed on this point but no longer contests it.

This was the sole argument made by the County and Reynolds for a downward adjustment to the lodestar. In their opposition to the interim fee motion filed May 17, 1999, respondents did not argue that the lodestar was somehow too high in relation to the actual damages recovered by Schneider. ER 635-89. Nor would

**The Final Fee Motion**

After granting rehearing on the interim fee motion and issuing a revised decision, App. 34a-83a, the district court entered final judgment. ER 1621-22. Schneider then filed his final fee motion which covered the last year of work on the case by Schneider's counsel on motions that had resulted in the recovery from respondents of an additional $339,762.84.[7] Fed. R. Civ. P. 54(d)(2) provides

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such an argument have been tenable here. The evidence shows that Schneider was "confronted by two separate teams of defense lawyers, each of whom aggressively defended the case," working "with relatively unlimited resources," and offering "no opportunities to cut the litigation short." ER 766. In particular, Reynolds was represented by a San Diego law firm that "has earned the reputation of being a relentless opponent" which "aggressively litigates every issue in a case." ER 407-08 ¶10. As the Seventh Circuit has noted, where a Section 1988 plaintiff is confronted by "tenacious resistence" in a case involving relatively minor stakes, as long as "the exertion on the plaintiff's side" is not "unreasonable in relation to the defense," an award of attorneys' fee greater than the judgment is permissible. *Barrow v. Falck*, 977 F.2d 1100, 1104 (7th Cir. 1992) (Easterbrook, J.). "Although private parties looking only to their own interests would not invest more in litigation than the stakes of the case," in the area of constitutional torts a different approach is needed to ensure that people cannot "get away with small offenses. . . . Section 1988 helps to discourage petty tyranny. Awarding the full cost of litigation, which looks excessive in the single case, is sensible because it aids in the enforcement of rules of law." *Id.* at 1103-04. In *Barrow* the Seventh Circuit indicated that an otherwise justified fee award of eleven times the actual damages recovered would be permissible. *Id.* Schneider's interim fee motion requested attorneys' fees and expenses about seven times larger than his ultimate recovery of $102,000.

[7] During this last year of work Schneider's counsel: (1) orally argued and prevailed on a posttrial motion for prejudgment interest, adding $34,145.54 to the jury's fair market value award of $67,795.50, ER 892-96; (2) prevailed on the interim fee motion, winning another $278,984.76, ER 1065-66, against an opposition so tenacious that respondents suggested that Schneider should receive only 5% of the fees and expenses sought, ER 1867; and (3) prevailed on a motion for reconsideration which resulted in the district court

that a motion for attorneys' fees and expenses "must be filed and served no later than 14 days after entry of judgment." Schneider's final fee motion was timely served and filed on April 13, 2000, fourteen days after final judgment was entered on March 30, 2000.[8]

The final fee motion was supported by declarations documenting the substantial attorney time and expenses incurred on the case in the last year of work on the case, including a detailed expert declaration demonstrating that the time and expenses incurred were reasonable, and in particular that the time initially spent on the interim fee motion was extremely modest and only grew as needed to respond to objections and discovery requests raised against the interim fee motion. ER 1628-80, 1842-1925. (The expert affidavit, which appears at ER 1842-55, is reprinted at App. 103a-114a) The County and Reynolds submitted no evidence controverting the reasonableness of the time or expenses for the work covered by the final fee motion, ER 1736-1833, save for evidence relating to less than twelve hours expended on a procedural matter, the claim to which Schneider then dropped. ER 1638-40, 1758-60, 1807-34, 1858 n.1.[9]

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adding another $26,632.54 to the fee award on the interim motion, for a total of $305,617.30 on the interim fee motion. ER 1579.

[8] Without discussing the deadline set in Fed. R. Civ. P. 54(d)(2)(B) or Schneider's compliance with that deadline, the district court suggested that Schneider's final fee motion was somehow untimely. App. 98a. Schneider rebutted this suggestion on appeal, *see* Brief of Appellant at 4, 49, and in its decision below the court of appeals did not question the timeliness of the final fee motion and reached the merits of the issues raised by Schneider. App. 1a-5a.

[9] Counsel for the County and Reynolds did assert in the legal memorandum they filed that the hours and expenses claimed appeared to be excessive or vague. *E.g.*, ER 1745-46, 1749, 1752. And they objected in advance to the submission of any further evidence with Schneider's reply brief on the final fee motion. ER 1760. In response, Schneider pointed out that the County and

Despite the uncontroverted evidence supporting the final fee motion and the fact that this work resulted in Schneider obtaining $339,762.84 in additional relief, the district court refused to award anything for the hundreds of hours of work, and tens of thousands of dollars of expenses, that Schneider's counsel had proved they had reasonably incurred on the case after March 29, 1999. Even before the final fee motion was filed and the district court knew the evidentiary basis of the final fee motion, it ruled out any fees for work done after March 29, 1999, at the close of its order granting reconsideration of the interim fee motion and awarding an extra $26,632.54 in fees. App. 83a ("the Court declines to award any fees for the motion for attorneys fees and expenses or the motion for reconsideration.").[10] Once the final fee motion was

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Reynolds had "wholly failed to meet their burden, in response to plaintiff's motion, to present *evidence* disproving the reasonableness of the time and expenses actually incurred by plaintiff's counsel in the case." In an abundance of caution, they also submitted 85 pages of evidence rebutting these assertions. ER 1842-1925. This additional evidence was entirely proper because in his moving papers, under Fed. R. Civ. P.54(d)(2) Schneider was only required to "state the amount or provide a fair estimate of the amount sought." The rule "does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees," although "[t]his material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case." Advisory Committee Notes to Rule 54(d). Rule 54(d)(2)(C) requires that a district court "shall afford an opportunity for adversary submissions" on the "request of a party," a procedural vehicle that "assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services." Advisory Committee Notes. The County and Reynolds made no request for adversary submissions; they simply filed opposition papers asserting without evidentiary support that the hours and expenses were unreasonable. ER 1736-61.

[10] After the final fee motion was filed, the district court ascertained that $8,400 of its interim fee award actually covered some initial work on the interim fee motion done before March 29, 1999, so it corrected its position to indicate that this amount was all it

filed, despite detailed, uncontroverted expert and other testimony proving that all the hours and expenses claimed were reasonable, the district court criticized the number of hours expended in the final year as unreasonable and refused to award anything for the 549.2 hours of work done by Schneider's counsel during the last year of the case, or even to reimburse Schneider's counsel for any of the $33,119.65 in out-of-pocket expenses incurred during the last year. *See* ER 1628-30, 1888, 1945-50, 1934-43.

**The Court of Appeals' Decision**

Schneider appealed from the district court's disposition of his fee motions. He specifically urged the Ninth Circuit to follow the Third and Seventh Circuit decisions that have interpreted Section 1988 and this Court's decisions as barring a district court from disregarding uncontroverted evidence on the actual historical market rates of the timekeepers' services, on the appropriate multiplier to adjust for delay, and on the actual number of hours reasonably expended on a matter. *See* Brief of Appellant at 33-34, 36-38, 45-49; Reply Brief of Appellant at 5-7. The panel rejected these arguments as inconsistent with Ninth Circuit precedent, a point that the panel regarded as so clear that it marked its decision not for publication.

Citing *Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir. 1997), *cert. denied*, 525 U.S. 827 (1998), the panel rejected as "wrong as a matter of law" Schneider's contention that the "rates customarily billed by Schneider's counsel should be determinative of the court's finding with respect to hourly rates." App. 3a. It

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would allow for litigation of fees. App. 99a. But the record is clear that the district court awarded nothing in fees or expenses for the year of work after March 29, 1999, during which Schneider prevailed on three motions and won an additional $339,762.84, despite uncontroverted evidence that the fees and expenses were reasonable.

also rejected Schneider's related argument that the district court erred in refusing to adjust the hourly rates upwards by 10% per year of delay in payment, to match the lowest interest rate charged in the California legal market for delay in payment. App. 3a-4a. *Barjon*, the most recent Ninth Circuit decision relied on by the panel, specifically rejected one of the leading Seventh Circuit decisions relied on by Schneider on the use of an attorney's customary billing rate to establish market value. 132 F.3d at 501 (rejecting Judge Easterbrook's decision in *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1149 (7th Cir. 1993)) (see p. 22, *infra*).

Likewise, with respect to the district court's refusal to award anything on the final fee motion for the substantial time and expenses incurred by Schneider's counsel in the year following March 29, 1999, during which Schneider won an additional $339,762.8430 in prejudgment interest and attorneys' fees, the panel rejected Schneider's argument that it should adopt the approach of the Third Circuit under which "uncontroverted sworn declarations proving that all the time and expenses were reasonable" are controlling. Brief of Appellant at 49. Under the law of the Ninth Circuit, the panel held, the district court was "well within its discretion" to reject Schneider's final fee motion in its entirety even though it was supported by several sworn declarations and no evidence was submitted by the County or Reynolds in opposition. App. 4a-5a.

Schneider timely filed a petition for panel rehearing or rehearing en banc, urging the Ninth Circuit to bring its Section 1988 jurisprudence into conformance with this Court's precedents and with holdings of the Third and Seventh Circuits. On May 16, 2002, the rehearing petition was denied. App. 6a.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the existing circuit split between the Ninth Circuit and several other circuits over whether, in ruling on a motion for Section 1988 attorneys' fees, a district court may disregard uncontroverted evidence on the actual historical market rates of the timekeepers' services and on the actual number of hours reasonably expended on the matter. By granting certiorari this Court can bring consistency to an important area of Section 1988 fee litigation and reinforce its past rulings emphasizing the objective, market-oriented, record-based nature of the "lodestar" determination, thereby promoting greater efficiency and predictability in fee litigation nationwide.

**1.** 42 U.S.C. § 1988(b) provides for "a prevailing party" such as Schneider to receive "a reasonable attorney's fee as part of the costs." In enacting Section 1988, Congress sought to enhance the ability of prospective civil rights plaintiffs to find high-quality counsel to represent them by offering compensation reflecting market conditions prevalent in other areas of complex litigation, not the lower, second-class compensation that had historically been awarded for civil rights work under previous judge-made law. As noted in the Senate Report on Section 1988, Congress "'intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust case[s], and not be reduced because the rights involved may be nonpecuniary in nature.'" *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983) (quoting S. Rep. No. 94-1011, p. 6 (1976)) (citation omitted). *See also* Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 290, 293-94, 300, 306-15, 321-24 (1977); Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 Tex. L. Rev. 865, 874-77, 897, 923-24, 929-40 (1992).

Initially under Section 1988, some lower courts determined the "reasonable" amount of fees to which a prevailing party was entitled based on a subjective weighing of twelve factors identified in the Fifth Circuit's influential opinion in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See Gisbrecht v. Barnhart*, 122 S. Ct. 1817, 1824-25 (2002). Beginning in *Hensley*, this Court has required the uniform use of the "lodestar" method, which is a more "objective basis" for determining a reasonable fee, one predicated on "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. *See also Gisbrecht*, 122 S. Ct. at 1824 (sketching the development of the lodestar method "as an objective measure of a lawyer's labor"). For the past two decades "'the "lodestar" figure has, as its name suggests, become the guiding light of [this Court's] fee-shifting jurisprudence.'" *Id.* at 1825 (quoting *Burlington v. Dague*, 505 U.S. 557, 562 (1992)).

Three aspects of this Court's decisions on the lodestar method are especially relevant to the issue in this case. First, the whole point of using the lodestar method is to limit the relevance of judicial subjectivity. This Court mandated its use because "[s]etting attorneys' fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986). The lodestar method "provide[s] a more analytical framework for lower courts to follow than the unguided 'factors' approach provided by *Johnson*." *Id.* By narrowing judicial discretion through its use of "an objective basis" for calculating fees, the lodestar method also helps ensure that a "request for attorneys' fees" does not "result in a second major litigation," *Hensley*, 461 U.S. at 433, 437, thereby saving substantial transaction costs across a wide range of cases.

Second, and also narrowing judicial discretion, this Court has "consistently looked to the marketplace as [its]

guide to what is 'reasonable,'" so that the focus under the lodestar analysis is whether the hourly rates, and hours claimed "are consistent with market rates and practices." *Missouri v. Jenkins*, 491 U.S. 274, 285, 287 (1989). Thus, this Court has "repeatedly stressed that attorney's fees awarded under [Section 1988] are to be based on market rates for the services rendered." *Id.* at 283. The same is true with regard to the upward adjustment of market rates to account for delay in payment, given that "compensation received several years after the services were rendered — as it frequently is in complex civil rights litigation — is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings." *Id.* This market reality warrants "adjusting the fee based on historical rates to reflect its present value" and thereby offset "the delay factor." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987). Likewise, as to hours claimed, this Court has indicated that to match market practices "'counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter."'" *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989) (quoting S. Rep. No. 94-1011, p. 6 (1976)) (citation omitted).

Third, and also narrowing judicial discretion, this Court has directed that determinations of the market rate for services, and whether the hours claimed are reasonable given market practices, are to be based on record evidence. In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court made clear that "the burden is on the fee applicant to produce satisfactory evidence" in support of the fees requested, but that when "the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988." *Id.* at 896 n.11, 897. Once the movant's burden has been met, the burden shifts to the fee opponent to controvert that evidence if it objects to

the grant of the fee motion in full. As this Court noted with regard to the particular fee motion involved in *Blum*, the defendant's failure "to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, . . . or the facts asserted in the affidavits submitted by [plaintiff's] counsel" meant that defendant had "waived her right to an evidentiary hearing in the District Court," as no "facts are disputed . . . [i]n view of the trial strategy she chose." *Id.* at 892 n.5.

**2.** Observing these simple principles for applying the lodestar method — limit judicial subjectivity, replicate market conditions, and base decisions on record evidence — several circuits have concluded without difficulty that where a movant's evidence of the reasonable market rate for services or of the reasonable number of hours actually spent on a case consistent with market practices is uncontroverted, the district judge should not disregard this evidence and substitute his or her subjective view of what award is "reasonable."

Perhaps the leading decision is that of the Third Circuit in *Cunningham v. City of McKeesport*, 753 F.2d 262, 265-69 (3d Cir. 1985) (Gibbons, J.), *vacated on other grounds*, 478 U.S. 1015 (1986), *reinstated*, 807 F.2d 49 (3d Cir. 1986) (Becker, J.), *cert. denied*, 481 U.S. 1049 (1987). In *Cunningham*, the district court — like the district court in this case — refused to calculate the lodestar using the usual billing rate of the plaintiff's lead attorney, which was established through uncontroverted evidence. Instead, the district court slashed that rate in half, from $100/hour to $50/hour. *Id.* at 265-66. The district court in *Cunningham* — like the district court in this case on the final fee motion — also refused to award the full number of hours that the plaintiff had proved, through uncontroverted evidence, were actually and reasonably spent on the case. Instead, the district court cut the hours by a third, from 326 hours to 219 hours. *Id.* Like the district court in this case, the district court

in *Cunningham* awarded less than the full hourly rate, and less than the full number of hours proven, even though the defendants "filed no affidavits in opposition to the motion" and "did not seek an opportunity to cross-examine [the lead plaintiff's attorney] on his affidavit," so that "no challenge was made to the accuracy" of the affidavit. *Id.* at 265.

Applying this Court's precedents, the Third Circuit reversed and, without the need for a remand, ordered that the full amount sought on the uncontroverted fee motion be granted. *Id.* at 269. It explained that in statutory fee cases which are "genuinely adversarial" (as compared with, for example, fund in court cases or bankruptcy cases), "when an opposing party has been afforded the opportunity" to present evidence in opposition to a fee motion, "and declines to do so, no reason occurs to us for permitting the trial court to disregard uncontested affidavits filed by a fee applicant." *Id.* at 267. With regard to the hours claimed, the Third Circuit held that unless the district court "has personal knowledge" that certain hours "were not in fact expended on the case," it could not reject the hours proved up in a sworn affidavit, as "there must be a record basis for the court's rulings." *Id.* Likewise, the court held that when an attorney submits an affidavit stating the rate "that his firm normally bills his time at," and that affidavit is uncontroverted, even where the district court believes that the attorney "is relatively inexperienced" the uncontroverted affidavit controls the ultimately "factual question" of the market value of the services in question. *Id.* at 268.

At a later stage of the case, the Third Circuit summed up the approach of its *Cunningham* decision by stating that it is "inappropriate for a district court in an adversarial system to reject uncontradicted sworn affidavits because of reasons not raised by opposing counsel and on the basis of facts 'of which the trial court has no personal knowledge.'" *Cunningham v. City of McKeesport*, 807 F.2d at 53 (Becker, J.) (quoting

*Cunningham*, 753 F.2d at 267). *See also Smith v. Philadelphia Housing Authority*, 107 F.3d 223, 225 (3d Cir. 1997) (once the plaintiff has met the burden of proving hourly rates, the "defendant may contest that prima facie case only with appropriate record evidence," and "[i]n the absence of such evidence, the plaintiff must be awarded attorney's fees at her requested rate"); *Coleman v. Kaye*, 87 F.3d 1491, 1510 (3d Cir. 1996) ("a district court may not set attorneys' fees based upon a generalized sense of what is customary or proper, but rather must rely upon the record.").

The Third Circuit applies this simple, sensible rule derived from this Court's precedents not only to the matter of historical billing rates, but to how those billing rates are adjusted upward to compensate attorneys for delay between their rendering of services and their compensation at historical rates which are premised on prompt payment. In *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990), the fee opponent — like the fee opponents in this case — did not submit any evidence to controvert the fee movant's method of computing delay compensation. The Third Circuit therefore held that the district court committed reversible error in denying the upward adjustment sought by the movant to compensate for the delay. *Id.* at 1188-89.

The Seventh Circuit likewise has a consistent line of decisions emphasizing the objective, market-oriented, record-based analysis that district courts must engage in under the lodestar method required by this Court. Its approach allows for hourly rates to be set based on the most accurate, objective evidence available, advancing both the interest of efficiency (the actual market rates can be readily proved) and the interest of fairness (the fee opponent pays no more than the ordinary cost of the timekeepers' services). Chief Judge Posner emphasized the point as follows, in a case where the district judge refused to award fees using the attorneys' customary billing rate, instead capping all rates at $175/hour:

> It is apparent what the district judge's mistake was. He thought he knew the value of the class lawyers' legal services better than the market did. What the market valued at $350 he thought worth only half as much. He may have been right in some ethical or philosophical sense of "value" but it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order.

*In re Continental Illinois Sec. Litigation*, 962 F.2d 566, 568 (7th Cir. 1992). *See also Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996) (Easterbrook, J.) ("Courts award fees at the market rate, and the best evidence of the market value of legal services is what people pay for it. Indeed, this is not 'evidence' about market value; it *is* market value."); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993) ("the best measure of the cost of an attorney's time is what that attorney could earn from paying clients"); *Pressley v. Haeger*, 977 F.2d 295, 299 (7th Cir. 1992) (Easterbrook, J.) ("Fee litigation under § 1988 depends on what the market rate is rather than what litigants and judges think it ought to be," and where the uncontroverted record evidence establishes a market rate for a given timekeeper, "§ 1988 requires the judge to use that rate").

It is important to note that the Seventh Circuit's approach is neither pro-plaintiff nor pro-defendant, but evenhanded and sensible, as the court has applied this approach to prohibit a district court from granting counsel for a civil rights plaintiff a "market rate" higher than the rate he regularly charges private clients in actually "selling his services in the market." *Barrow v. Falck*, 977 F.2d 1100, 1104-05 (7th Cir. 1992) (Easterbrook, J.). *See also Shakopee Mdewankton Sioux*

*Community v. City of Prior Lake*, 771 F.2d 1153, 1160-61 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) (same). District judges in the Ninth Circuit are not similarly constrained. *E.g.*, *Davis v. San Francisco*, 976 F.2d 1536, 1548 (9th Cir. 1992) (holding that district court's award of billing rates that "exceeded the rates charged by several of the [plaintiffs'] attorneys in their private practices" was not an abuse of discretion).

The Third and Seventh Circuits are the circuit courts most insistent on constraining the discretion of district judges where the record is uncontroverted concerning market rates and the number of hours actually and reasonably billed in accord with market practices. However, several additional circuits have issued decisions that differ from the approach of the Ninth Circuit. For example, the Eighth Circuit has observed, explicitly agreeing with the Seventh Circuit decision in *Gusman* which the Ninth Circuit has explicitly rejected (see p. 15, *supra*), as follows:

> Fee awards must be structured so that attorneys of quality and experience with other profitable demands upon their time will not need to sacrifice income available in alternative enterprises in order to effect a public policy intended to protect all citizens. In other words, "the market rate of legal time is the opportunity cost of that time, the income foregone by representing this plaintiff." Any other rule would relegate civil rights enforcement (and the law that results) to those lawyers with below-market billing rates. The rates for these lawyers are usually below market for a reason.

*Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir. 1993) (quoting *Gusman*, *supra*, 986 F.2d at 1149). At least one decision of the First Circuit has sounded this theme. *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) (Breyer, J.) ("the 'prevailing' rate 'in the community' for work

performed by an outside specialist (where that outside specialist is reasonable) is most likely to be that outside specialist's ordinary rate. If courts (without cause) award fees at less than that rate, they will tend to prevent those in smaller communities from obtaining the experienced legal counsel they may need, contrary to the policy behind awards of attorneys' fees to prevailing parties."). It appears that the Fifth and Sixth Circuits afford a scope of discretion to district judges on market billing rates somewhere between the narrow discretion afforded by the Third and Seventh Circuits and the vast discretion afforded by the Ninth Circuit. *E.g.*, *Islamic Center of Mississippi v. Starkville*, 876 F.2d 465, 469 (5th Cir. 1989); *Kelley v. Metroplitan County Board of Education*, 773 F.2d 677, 682-83 (6th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1083 (1986). Although a comprehensive review of the law of each circuit might well reveal further confusion over this issue, the differing approaches among the several circuits sketched above are sufficient reason for this Court to grant review to clarify this important aspect of Section 1988 litigation.

**3.** As set forth above, the law of the Ninth Circuit affords district judges vast discretion, when faced with record evidence on market rates and the number of hours actually and reasonably billed in accord with market practices, to disregard that record evidence and substitute their subjective views of what fee award strikes them as reasonable. That approach is inconsistent with the lodestar jurisprudence of this Court during the past two decades and with the decisions of other circuits. The procedural framework for the litigation of Section 1988 attorneys' fees is an important matter, one of interest to civil rights plaintiffs and defendants alike. The basic rules in this area should not vary depending on the circuit in which a party is litigating nor, within the Ninth Circuit, depending on which district judge is assigned to the case. In denying en banc review in this case, the Ninth Circuit rejected Schneider's specific request that it

overrule its decision in *Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir. 1997), *cert. denied*, 525 U.S. 827 (1998), in order to bring its law in this area into line with this Court's precedents and the approach of the Third and Seventh Circuits. *See* Petition for Panel Rehearing and Rehearing En Banc at 2, 10-11, 13-16. A grant of certiorari is needed to correct the Ninth Circuit's mistaken approach to Section 1988 litigation and the confusion in the lower courts generally (which would warrant a grant of certiorari even if this Court were inclined to view the Ninth Circuit's approach as correct).

The Section 1988 issue on which the circuits are divided is a legal issue that can be answered without extensive reference to the facts of the particular case in which this Court grants certiorari to resolve the issue. This Court should therefore grant review of the issue using the first available case. However, if the factual record of the particular case is of interest, two aspects of this case make it a particularly desirable vehicle for review of the issue.

First, it is clear from the record that in the materials Schneider filed with his interim fee motion, he met his burden of proving that his lodestar request was predicated on the same hourly market rates at which the services of the ten timekeepers were historically billed and collected by Schneider's counsel on other cases between 1990 and 1999, and that Schneider sought an upward adjustment to these rates to reflect the delay in payment using the lowest interest rate historically charged in the California legal market for extended delay in payment, 10% simple interest. See pp. 7-8, *supra*. Yet the County and Reynolds elected to submit no evidence of their own to rebut either point — indeed, their counsel admitted on the record that he had not found an attorney willing to controvert the evidence submitted with Schneider's interim fee motion. See note 4, *supra*. Likewise, the County and Reynolds left the evidence submitted by Schneider with his final fee motion uncontroverted by any evidence of their own. See pp. 12-

13, *supra*. Thus, with respect to the most relevant factual point, this case has a straightforward record similar to the record this Court considered in *Blum*, 465 U.S. at 892 n.5. See pp. 18-19, *supra*.

Second, it is clear from the record that here the district court was repeatedly asked by Schneider to confine itself to the record evidence and arguments submitted by the parties, and that Schneider invoked this Court's precedents, both standing alone and as explicated by decisions of the Third and Seventh Circuits, in urging the district court that because the County and Reynolds had left his evidence uncontroverted the district court should simply grant the relief requested. *E.g.*, ER 545-46, 549, 750-51, 907-08 ¶¶2-4, 979, 981-82, 988-91, 996-97, 1050 ¶5 & n.1, 1091-95, 1097-1108, 1161-76. Indeed, Schneider argued that it would violate procedural due process and the constraints of Article III adjudication for the district court to do otherwise. ER 1050 ¶5 & n.1. The district court's rejection of these arguments and the wide-ranging scrutiny it subsequently gave Schneider's uncontroverted fee motions illustrates the virtually unlimited discretion which district judges in the Ninth Circuit feel free to exercise on the basis of subjective factors that are the very thing that the lodestar method was adopted to supplant. See pp. 17-19, *supra*.

For example, during the oral argument on the interim fee motion, Schneider's counsel argued that the district court was required to limit itself to the arguments and evidence submitted by Schneider and the County and Reynolds. ER 979, 981-82, 988-90. The district court expressed the view that its task of deciding on a "reasonable" fee trumped Schneider's arguments on the requirement of an objective, market-oriented, record-based analysis. Addressing defendants, the district court indicated it understood but was rejecting the argument of Schneider's counsel

> that since you didn't come up with a declaration, that the Court can't independently challenge any of the reasonableness of the fees. I disagree with that, because I think it's the Court that . . . makes the award and the Court is going to award reasonable attorneys' fees, not simply just the attorneys' fees that the parties have requested.

ER 986.

The extraordinary scope of the discretion the district court was exercising was made even clearer later in the oral argument, when the district court raised a new fee objection on its own initiative. Schneider's counsel pointed out that "defendants have not objected on that basis," and that if they had so objected Schneider would have responded with additional evidence. ER 989-90. The district court responded:

> The Court is raising it sua sponte, and the Court is giving you an opportunity to litigate all of these matters in a reasonable fashion today, because I am putting you on notice that the Court has problems with your submissions based on the reasonableness of the attorneys' rates, on the documentation of the contemporaneous billing records, on the number of hours, on the fact of the interest, on your rate for law students — $85 an hour the Court finds to be excessive and unreasonable. And so the Court is putting you on notice that it is raising these at the trial court level, and so it will be an issue and the Court reserves the right to disallow any fees that the Court believes are excessive and unwarranted . . . .

ER 990.

In response, Schneider's counsel urged the district court to read the Third Circuit's leading decision in *Cunningham*, "which says that basically courts are not to

. . . come up with their own objections if the defendants did not raise them and have not presented evidence." ER 991. *See also* ER 991 (noting that without a declaration, defendants "have no evidence to contest the reasonableness [of] the time it took to perform various tasks, whether the task should have been performed, the reasonableness of the hourly rates of the people who worked on it"); ER 996-97 (noting that "defendant's opposition didn't put in an affidavit disagreeing with us" on the applicable market interest rate for delay: "That is ultimately an evidentiary matter, how the market will handle a certain delay, and we think the evidence is uncontradicted, that at least 10 percent is a reasonable number.").

The fact that these objections fell on deaf ears and the district court subsequently rejected much of Schneider's interim fee motion, and all of Schneider's final fee motion — even though the record evidence presented with these motions was left uncontroverted — illustrates the degree to which the Ninth Circuit has fallen out of step with this Court and other circuits. Despite this Court's care during the past two decades to emphasize that the lodestar method is an objective, market-oriented, record-based approach to the efficient litigation of attorneys' fees motions, the district court handled this case in a manner alien to that approach. It specifically asserted "the right to disallow any fees that the Court believes are excessive and unwarranted." ER 990. The Ninth Circuit's affirmance illustrates the vast discretion that exists under Ninth Circuit law for a district judge to rule either against a plaintiff or for a plaintiff (see pp. 22-23, *supra*) on a fee motion based on his or her subjective assessment of what seems warranted. Although this Court need not delve into the factual details of this case to decide the issue presented, the record contains ample additional support for a grant of certiorari and confirms that this case would be a suitable vehicle for deciding that issue.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 14, 2002

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**FILED**
**MAR 21 2002**
**CATHY A. CATTERSON, CLERK**
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| LOUIS SCHNEIDER, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | Nos. 00-55798, |
| vs. | ) | 00-56329 |
| | ) | |
| COUNTY OF SAN DIEGO, | ) | D.C. No. |
| and REYBRO, INC., | ) | CV-90-1738-H |
| a California corpora- | ) | |
| tion, dba Quality | ) | MEMORANDUM* |
| Auto Recycling, | ) | |
| | ) | |
| Defendant. | ) | |

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, Chief District Judge, Presiding

Argued and Submitted June 12, 2001
Pasadena, California

BEFORE: WARDLAW, PAEZ, and TALLMAN,
Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

In these consolidated appeals, Louis Schneider challenges the district court's award of fees and costs pursuant to *42 U.S.C. § 1988.* Schneider also requests **[2]** fees for these appeals. We have jurisdiction under *28 U.S.C. § 1291,* and we affirm.

After over a year of fee litigation, the district court awarded Schneider $ 305,617.30 out of his requested $707,375.74 in attorney's fees and expenses in a case where the total amount of the underlying judgment was $67,795.50. In cases brought under 42 U.S.C. § 1988(b), "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee ...." 42 U.S.C. § 1988(b). The district court followed the well-established procedure for determining reasonableness by analyzing the lodestar for those fees. *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). We review the award for an abuse of discretion, noting that the district court may "in rare cases ... make upward or downward adjustments to the presumptively reasonable lodestar" on the basis of a series **[3]** of factors, including the delay in payment and the plaintiff's overall success in pursuing the litigation. *Gates v. Deukmejian,* 987 F.2d 1392, 1396, 1402 (9th Cir. 1993). Moreover, the district court has "considerable discretion in determining what attorney's fee is 'reasonable' under the circumstances of [the] case." *Schwarz v. Sec'y of Health & Human Servs.,* 73 F.3d 895, 901 (9th Cir. 1995).

Schneider contends that the district court legally erred in five ways, each of which undermines the award: (1) deciding the fee motion based on its own *sua sponte* objections; (2) adopting a "fair" hourly rate for various timekeepers' services, rather than using Schneider's proposed market rates; (3) failing to award Schneider a full ten percent upward adjustment to account for delay in payment; (4) improperly adjusting the lodestar downward to reflect Schneider's limited success; and (5) failing to award fees incurred for the litigation of the fee petition ("fees-on-fees"). We conclude that the district court did not abuse its discretion in finding that, under

the totality of the circumstances and utilizing the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975),[1] **[4]** a fair and reasonable award of fees and costs is $ 305,617.30.

Schneider's first argument, that the district court *sua sponte* made and ruled upon its own objections to law student rates, contemporaneous billing records, the rates at which Schneider paid contract lawyers and paralegals, and correspondence between himself and his lawyer regarding billing, is factually incorrect. In fact, the County repeatedly made oral and written objections to these aspects of the claimed attorney's fees. His second argument, that rates customarily billed by Schneider's counsel should be determinative of the court's finding with respect to hourly rates, is wrong as a matter of law. *See Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir. 1997) (consideration of attorney's **[5]** expertise and experience in application of the prevailing rate for similarly qualified local counsel is well-established approach in the Ninth Circuit); *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986) ("Determination of a reasonable hourly rate is not made by reference to rates actually charged the prevailing party."). Because the district court did not clearly err in finding that local counsel was available, willing, and able to handle this case, it did not abuse its discretion in applying rates comparable to the rates charged for similar services in the San Diego legal community.

Schneider's third argument, that the district court abused its discretion by refusing to adjust the lodestar upward to account for delay in payment of fees by a ten percent rate of interest, is both factually and legally erroneous. The district court in fact awarded a 4.545% rate of interest for work performed in the early stages of

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[1] Although we have noted that the *Kerr* approach is "disfavored," the district court's reliance upon it is harmless error in view of its correct application of subsequent cases. *Corder v. Gates*, 947 F.2d 374, 378 (9th Cir. 1991).

litigation and awarded current rates of interest for work performed at later stages. It is not an abuse of discretion to utilize different methods in compensating for delay at different stages of the litigation. *See Chem. Bank v. City of Seattle (In Re Washington Pub. Power Supply Sys. Sec.)*, 19 F.3d 1291, 1305 (9th Cir. 1994) **[6]** (a district court is "free to use *either* current rates for attorneys of comparable ability or experience or historical rates coupled with a prime rate enhancement" for different stages of the litigation).

Nor did the district court abuse its discretion in adjusting the lodestar downward based on Schneider's limited success on the merits of the litigation. *Hensley*, 461 U.S. at 434. Schneider failed on several of his original claims, did not prevail against ten of the twelve original defendants, and did not recover a large portion of his originally claimed damages, including punitive damages, damages for emotional distress, and lost income and profits. These claims involved a common core of facts and were based on legal theories related to the claims upon which Schneider succeeded. *See Hensley, 461 U.S. at 435.* Moreover, the district court reduced the lodestar for the first phase of the litigation only, which was the phase in which Schneider pursued his unsuccessful claims. This was not an abuse of its discretion. *See McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805, 810 (9th Cir. 1995) (ordering the district court to "reduce the **[7]** attorney's fees award so that it is commensurate with the extent of the plaintiff's success").

Finally, the district court was well within its discretion to decline to award additional "fees-on-fees." The district court compensated Schneider for fees for the preparation of the initial fee request in the amount of $ 8,400, declining only to award fees for Schneider's motion to reconsider and subsequent fee litigation. The district court did not err in finding that Schneider's counsel failed to minimize the hours spent in preparing the fee petition, delegate tasks that could have been performed by associates at a lower rate, and present all documents relevant to the fee petition with the initial

motion. It correctly concluded that the request was therefore unreasonable under the standards set by law, reasoning, "to permit an award of additional fees-on-fees in these circumstances gives parties an incentive to draw out the fee litigation."

As the Supreme Court has stated, "no award of fees is 'automatic' .... Exorbitant, unfounded, or procedurally defective fee applications -- like any other improper position that may unreasonably protract proceedings -- are matters that the district **[8]** court can recognize and discount." *Commissioner, INS v. Jean*, 496 U.S. 154, 163 (1990). The district court had previously determined what constituted a reasonable award; it did not abuse its discretion in concluding that any additional amounts would be excessive. *See id.* at 161-62 (fee shifting statutes favor treating a case as an "inclusive whole"). We share the sentiment expressed by the Seventh Circuit in *Muscare v. Quinn*, 680 F.2d 42, 44 (7th Cir. 1982), that "for rather obvious practical reasons we are loath to disturb a ruling by a district judge on a request for second-round attorneys' fees."

Finally, Schneider claims entitlement to attorney's fees and costs on appeal. Because Schneider did not prevail on the merits of these appeals, we decline to award attorney's fees and costs. *See Trevino v. Gates*, 99 F.3d 911, 926 (9th Cir. 1996).

AFFIRMED.

**FILED**
**MAY 16 2002**
**CATHY A. CATTERSON, CLERK**
**U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| LOUIS SCHNEIDER, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | Nos. 00-55798, |
| v. | ) | 00-56329 |
| | ) | |
| COUNTY OF SAN DIEGO, | ) | D.C. No. |
| and REYBRO, INC., | ) | CV-90-1738-H |
| a California corpora- | ) | |
| tion, dba Quality | ) | ORDER |
| Auto Recycling, | ) | |
| | ) | |
| Defendant. | ) | |

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**FILED**
99 SEP 29 AM 8:16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| LOUIS SCHNEIDER,<br><br>Plaintiff,<br>vs.<br><br>COUNTY OF SAN DIEGO, et al.,<br>Defendant. | ) | CASE NO. 90-CV-1738 H<br><br>**ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES** |

Plaintiff Louis Schneider, through his attorneys Louis Goebel and Kenneth Chesebro, filed a motion with this court for an award of attorney's fees. This court entered judgment as a matter of law as to liability in Schneider's favor on his claims of takings and procedural due process violations on December 21, 1998. A subsequent trial was held, on damages only, and the jury returned a verdict in favor of the plaintiff and against defendants County of San Diego and Reybro, Inc. A total verdict was entered for plaintiff Schneider in the amount of $67,795.50. Schneider has filed a motion to recover attorney's fees, pursuant to 42 U.S.C. section 1988(b).

After fully considering the papers filed and the law, the court grants plaintiffs motion for attorney's fees. The court finds a reasonable and proper award for Louis Goebel to be **$136,626.44** in attorney's fees and **$31,268.411**[1] in costs, for a total award of **$167,894.85**. The court finds a reasonable and proper award for Kenneth Chesebro to be **$97,140.37** in attorney's fees and **$13,949.54** in costs, for a total

[1] This amount includes $8,100.07 in costs already taxed by the Clerk of Court.

award of **$111,089.91**. The court's total award of attorney's fees and costs in this matter **$278,984.76**.

**Background**

Plaintiff Schneider originally filed this action under 42 U.S.C. section 1983 on December 13, 1990, alleging violation of his civil rights. The pertinent facts are described in the Ninth Circuit opinion in *Schneider v County of San Diego*, 28 F.3d 89 (9th Cir. 1994). Schneider owned a 1.4 acre lot in a rural, agriculturally zoned area of San Diego County, near the city of Oceanside. Schneider did not reside on the property, but rented out the house located on the lot, and parked nine buses, to motorhomes, and two automobiles on the lot. The vehicles were visible from the public road that runs in front of the lot. After receiving a variety of complaints about the vehicles, the County investigated and determined the vehicles violated county zoning ordinances. The County posted a "Notice And Order To Abate" on the property, which Schneider appealed. At the hearing before the County Abatement Board, the hearing officer determined Schneider had violated San Diego County zoning ordinances, and that his violations constituted a public nuisance. Schneider was given 30 days to abate the nuisance. When Schneider did not remove the vehicles, the County towed the vehicles from the lot and later destroyed them.

Schneider filed suit against the County and the towing company, Reybro, Inc., under 42 U.S.C. section 1983. Schneider alleged violations of his civil rights, including violations of procedural due process, Fourth Amendment search and seizure violations, and a variety of state law claims. The court granted summary judgment in favor of defendants and dismissed the case. On appeal to the Ninth Circuit, the Court of Appeals held that Schneider's Fourth Amendment rights were not violated. However, the Ninth Circuit reversed the grant of summary judgment on procedural due process grounds, and remanded to the district court an allegation

of Fifth Amendment takings violation that was raised for the first time on appeal.

The matter proceeded to trial in this court, and the jury reached a verdict for defendants. Plaintiff Schneider appealed to the Ninth Circuit this court's denial of his motion for judgment as a matter of law. The Ninth Circuit, vacating the jury verdict, remanded to the district court with instructions to grant the motion.

On December 21, 1998, this court entered judgment as a matter of law as to liability on Schneider's claims of takings and procedural due process violations. The remaining issue was of damages only and Schneider, for strategic reasons, chose not to pursue the procedural due process claim, but to only pursue the claim that his property was taken without just compensation.

On January 20, 1999, the court entered a stipulation and order as to the value of four vehicles. A subsequent trial was held, on damages only, on nine remaining vehicles, and a total verdict was entered for plaintiff Schneider in the amount of $67,795.50. The court also granted Schneider's motion for prejudgment interest, awarding prejudgment interest in the amount of $34,145.54.

Plaintiff Schneider now moves this court for an award of attorney's fees, pursuant to 42 U.S.C. section 1988(b), as the prevailing party in the underlying action. The County, a municipal entity, opposes the motion, and asks the court to reduce the amount of fees awarded to Schneider.

**Discussion**

I. Standard of Law

42 U.S.C. section 1988(b) was enacted in 1976, and authorized district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation. See 42 U.S.C. § 1988(b); *Hensley v Eckerhart*, 461 U.S. 424, 429 (1983). 42 U.S.C. § 1988(b) allows an award of "reasonable," and not "actual" attorneys fees. Therefore

it is not sufficient for attorneys to provide the court with the number of hours spent and a corresponding billing rate; attorneys requesting fees have the burden of proving that the time spent and hourly rate are reasonable. The Supreme Court has recognized that district courts retain great discretion in calculating the reasonableness of the fee award. Id. at 437. The initial calculation is reached by determining the "lodestar" figure, which is the number of hours reasonably expended multiplied by a reasonable rate. See *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992).

In calculating the lodestar amount, the district court should take into account the totality of the circumstances, utilizing the pertinent factors set forth in *Kerr v. Screen Extras Guild*, 526 F .2d 67, 70 (9th Cir. 1975). See *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995) *(citing Hensley v. Eckerhart*, 461 U.S. 424,433 (1983)); see also *Robins v. Scholastic Book Fairs*, 928 F. Supp. 1027, 1031 (D. Or. 1996). These factors are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorney's, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Kerr*, 526 F .2d at 70.

To set a reasonable billing rate the court must consider the "prevailing market rates in the relevant community" and determine what a lawyer of comparable skill, experience and reputation would command in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); see also *Robins*, 928 F. Supp. at 1033. It is plaintiffs burden to produce evidence convincing the court "that the requested rates are in line with those

prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan v. Multnomah Cnty.*, 799 F.2d 1262, 1266 (9th Cir. 1986).

When determining a reasonable number of hours, courts should exclude hours not reasonably expended. "Counsel for the prevailing party should exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude hours from his fee submission." *Gates*, 987 F .2d at 1397, citing *Hensley*, 461 U.S. at 433-34. The moving party bears the initial burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. *Id.* at 433. The moving party also bears the burden of establishing entitlement to an award and demonstrating that the amount claimed is reasonable. Id. at 437. The burden then shifts to the opposing party to rebut the moving party's evidence. *Blum v. Stenson*, 465 U.S. 886, 892 n. 5 (1984).

Once the court has computed the lodestar, the court may make adjustments in the fee award based on the level of success. *Hensley*, 461 U.S. at 434. "If. . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiffs claims were interrelated, nonfrivolous, and raised in good faith." *Id.* at 435.

II. Analysis

Because of the lengthy progress of this case, the court has divided it into three sections. The first phase begins when the initial complaint was filed, and extends through the first summary judgment motion by defendants, the first appeal to the Ninth Circuit, and the first trial. Phase One ends on September 22, 1995, when the court denied plaintiff's motion for judgment as a matter of law and motion for a new trial. Phase Two

begins with plaintiff's second appeal to the Ninth Circuit, and extends to the remand to this court, on August 26, 1998. Phase Three covers all time since remand to this court.

A. Lodestar

The initial calculation of attorney's fees under 42 U.S.C. section 1988 is reached by determining the "lodestar" figure, which is the number of hours reasonably expended multiplied by a reasonable rate. *See Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). The court will determine a separate lodestar for each of plaintiffs two attorneys, Mr. Goebel and Mr. Chesebro.

Mr. Goebel acted as primary trial counsel in this matter. He first met with the plaintiff on December 3, 1990, and has represented plaintiff continuously since that time. Mr. Goebel has submitted an award request of $283,000.84 in fees and costs. Including a requested multiplier based on a rate of 10% interest, Mr. Goebel's requested award totals $417,400.55.

Mr. Chesebro acted as appellate counsel in this matter. He was initially retained by plaintiff Schneider in August, 1992, when he agreed to consult with Mr. Goebel. Mr. Chesebro has submitted an award request of $212,260.96 in fees and costs. Including a requested multiplier based on a rate of 10% interest, Mr. Chesebro's requested award totals $278,862.71.

1. Reasonable Number of Hours Billed

1. Louis Goebel

Mr. Goebel has submitted a total of 1,232.1 billable hours for the entirety of the case. The court has divided the case into three phases for consideration of billable hours expended. In view of the totality of the circumstances and the *Kerr* factors, the court finds **1209 hours** billed by Mr. Goebel were reasonable. The court will disallow 22.5 hours billed during Phase 1 of the case. The plaintiff was proceeding *pro se* at this time, and allowing recovery of those hours by counsel is not appropriate. The court finds the remainder of hours billed by Mr. Goebel in this matter are reasonable, and sets out the hours as follows.

[TABLE OMITTED]]

2. Kenneth Chesebro

Mr. Chesebro has submitted a total of 1018.41 billable hours for the entirety of the case. In view of the totality of the circumstances and the *Kerr* factors, the court approves as reasonable **882 hours** for work done by Mr. Chesebro and those working under him. Rather than list a detailed item-by-item analysis of Mr. Chesebro's request for fees, the court instead notes several of the County's meritorious contentions regarding the reasonableness of hours worked and the court's determination.

Mr. Chesebro was retained primarily in a consulting role as an appellate practitioner; his *pro hac vice* application to appear in the Southern District of California was not approved by the court until May, 1995. Mr. Chesebro has provided little or no documentation as to his fee arrangement with Mr. Schneider at the start of his involvement in the case, except for a reference in a fax dated February 12, 1993 that a contractual fee arrangement would be drafted.

However, no such arrangement was made until December 17, 1998, when Mr. Schneider signed a written fee agreement.

Mr. Chesebro has not produced contemporaneous billing records to the court. Instead, he has produced an invoice dated March, 1999. Although the court requested contemporaneous records, these were not provided. Even if the March, 1999 computer invoice is what Mr. Chesebro considers his raw billing data, the block billing entries in this invoice give little or no indication of how much time was spent on particular kinds of legal work. The invoice does not consistently separate entries by work done, but tends to group several tasks. The block billing entries are not sufficient to satisfy Mr. Chesebro's burden to demonstrate the reasonableness of hours spent on work. Additionally, an examination of the billing invoice submitted by Mr. Chesebro exhibits a high rate of delegation of work, resulting in duplication of efforts and a lack of efficiency. The County challenges Mr. Chesebro's inclusion of time spent supervising law students and contract workers in his total hours as duplicative.

Although Mr. Chesebro has billing records for 1991, there is no written documentation of Mr. Chesebro's agreement to work on the case until August 24, 1992. Therefore, the court will not allow recovery for the 6 hours spent by Mr. Chesebro in 1991. Mr. Chesebro did little substantive work on the case until 1993. For instance, many early billing entries merely record reading and analysis of cases and early court opinions. Plaintiff's first appeal challenged the court's grant of summary judgment for the county, and review of the record would not have been time-intensive. The second appeal followed a very brief trial, limited by the court to only nine hours per side or four court days; review of this record would be necessarily limited, as well. However, during Phases One and Two of the case, from 1993 to August, 1998, Mr. Chesebro hired a total of 7 different individuals to work under him on this case. Mr. Chesebro has not provided any written agreement demonstrating that Mr. Schneider

gave his permission for these individuals to be hired until after the fact, in a fee agreement dated December, 1998.

As Mr. Chesebro's expertise was appellate work, and review of the trial court record for both appeals was relatively brief, the court finds that the 592.21 hours for which Mr. Chesebro requests payment for two paralegals, two law students and three contract workers (junior attorneys) is excessive. especially because Mr. Chesebro also requests payment for a total of 426.2 hours for himself. The County alleges that the work performed by Mr. Chesebro and the work done by the individuals he hired had to overlap to a large degree, since there were a limited number of tasks involved in preparing for and litigating the two appeals. Mr. Chesebro has submitted only block billing entries to account for his time and the time of those individuals working under him. Some of the law students and contract workers who worked on this case were also working on different cases for Mr. Chesebro, and it is unclear from the block billing entries, especially in the case of the law students, whether the hours requested are hours reasonably spent working on Mr. Schneider's matter. The court finds that these block billing entries are not sufficient to demonstrate the reasonableness of such a large number of hours spent by several different individuals on a limited number of tasks. Therefore, the court has reduced Mr. Chesebro's requested hours for work he performed during the case by 10%. In addition, the court has reduced the hours requested for the paralegals, law students, and contract workers in Phase One by 10% for duplication of effort.

Mr. Chesebro has requested recovery of 14.5 hours of paralegal-level work that he performed during Phase Three of the trial. He requests recovery for this time at $65 per hour, in addition to the 110.25 hours in Phase Three for which he requests recovery at his attorney's hourly rate of $300. Phase Three begins after remand to this court. There was no appeal during Phase Three, and Mr. Goebel is a highly skilled trial litigator with thirty years of experience. The County asserts that the request for payment for the 14.5 hours of paralegal work

performed by Mr. Chesebro, in addition to the 110.25 hours he spent in his capacity as an attorney is unreasonable, and the court agrees. Therefore, the court will not allow recovery for the 14.5 hours of paralegal work performed by Mr. Chesebro during Phase Three.

The County has pointed out that, at the start of the case, depositions were attended by only one member of Mr. Goebel's law firm. However, after December 21,1998, once liability was established and plaintiff was more assured of an award of reasonable attorneys fees, both Mr. Goebel and Mr. Chesebro attended two depositions on January 19, 1999. The County contends that Mr. Chesebro unnecessarily joined Mr. Goebel at these two depositions, the pretrial conference on December 16, 1998 and the trial on damages on January 20, 1999. The trial on damages lasted one day, and addressed only the market value of the vehicles that had been removed from Mr. Schneider's property. Mr. Chesebro asserts that it was necessary for him to attend the depositions, pretrial conference, and trial "as second chair to Mr. Goebel." Mr. Chesebro states that he requests a recovery of $200 per hour for the time he spent as "second chair" to Mr. Goebel, instead of the $350 per hour he charged for other work performed during Phase Three. As set forth in Parts A.2.a. and A.2.b. of this order, the court has determined that $300 per hour is the reasonable rate for both attorney's work during Phase Three. Therefore, the combined hourly rate for Mr. Goebel and Mr. Chesebro at the pretrial proceedings and trial on damages is $600 per hour, which the court finds excessive. Therefore, a reduction in Mr. Chesebro's hours spent during the damages phase of the case is necessary. Accordingly, the court reduces Mr. Chesebro's hours by 25% for Phase Three.

Mr. Chesebro has requested recovery of 14.5 hours of paralegal-level work that he performed during Phase Three of the trial. He requests recovery for this time at $65 per hour, in addition to the 106.44 hours in Phase Three for which he requests recovery at his attorney's rate, which the court sets at $300 per hour. Phase Three

begins after remand to this court. There was no appeal during Phase Three, and Mr. Chesebro's involvement as an appellate specialist during that stage of the case was limited. The County asserts that the request for payment for the 14.5 hours of work such as faxing, copying and filing performed by Mr. Chesebro (usually considered overhead) in addition to the 110.25 hours Mr. Chesebro spent in his capacity as an attorney is unreasonable, and the court agrees. Therefore, the court will not allow recovery for the 14.5 hours of paralegal work performed by Mr. Chesebro during Phase Three.

In light of the law, the facts, and all the circumstances, the court finds **882 hours** to be a reasonable number of hours for Mr. Chesebro's role in this matter. The court notes that even with the necessary reductions in Mr. Chesebro's requested hours to address duplication of efforts by Mr. Chesebro and those working under him, the court has allowed Mr. Chesebro to recover payment for a total of 610 hours in Phase One for the appeal of a single summary judgment motion, including 71 hours spent by law students. The court also notes that while Mr. Chesebro requested recovery for 717 hours in Phase One for the appeal of one summary judgment motion, Mr. Chesebro requested recovery for 220 hours in Phase Two for the appeal of a four-day jury trial. The court finds that a total of 20 hours is reasonable for Phase Two. Finally, the court notes that Mr. Chesebro requested recovery for 121 hours during Phase Three. The only event that occurred during this stage of the case was a one-day trial on the market value of the vehicles towed from the plaintiffs lot. Given the extensive trial experience of Mr. Goebel, and the fact that Mr. Chesebro's expertise is in appellate work, Mr. Chesebro's involvement at this stage was not necessary. Nevertheless, the court has allowed Mr. Chesebro to recover payment for 64 hours during Phase Three.

[TABLE OMITTED]

2. Reasonable Hourly Rate

a. Louis Goebel

The Supreme Court has held that reasonable fees under 42 section 1988 "are to be calculated according to the prevailing market rates in the relevant community," taking into account the type of practice, the experience of the attorney, and the community in which the attorney practices. *Blum v. Stenson*, 465 U.S. 886,895 and n.ll (1984). Mr. Goebel has requested a billable rate of $325 per hour for the entirety of the case, and has submitted declarations in support of his request. Mr. Goebel has been practicing law for approximately thirty years in the San Diego area, and has focused his practice on land use litigation. (*Goebel Declaration*, Exh. A at 2.)

The County opposes this rate as unreasonable, and has submitted evidence in the form of declarations from attorneys in the San Diego area who have similar experience and qualifications to those of Mr. Goebel, and have worked on similar land use and zoning cases. The county's evidence shows a reasonable rate under those circumstances to range from $150 to $250 per hour. The court takes judicial notice of those declarations, which were filed in San Diego County Superior Court (between 1996 and 1998) and in the Southern District of California (in 1997). (*Defendants' Opposition*, Exh. B-D.)

The County's evidence shows that the hourly rate of a partner in the firm of Stephenson, Worley, Garratt, Schwartz, Heidel & Prairie, which works exclusively on zoning, planning and land use regulation in San Diego, ranged in 1996 from $150 to $225 per hour. (*Opposition*, Exh. C, -3, 6.) In another declaration, a San Diego attorney with twenty years experience in zoning and land use litigation stated that her billable rate had been between $150 and $250 dollars from 1990 to the present. (*Opposition*, Exh. D at 2.) Finally, the county submitted the declaration of an attorney in a San Diego firm with almost twenty years experience in complex environmental and land use litigation. That attorney's billing rate was $225 in 1996.

Accordingly, taking into account the declarations presented by both parties, as well as the nature of the work done, the experience of the attorney, the geographic area of Mr. Goebel's practice, the law and the totality of the circumstances, the court sets the reasonable hourly rate as follows:

**Phase 1: $150 per hour**
**Phase 2: $200 per hour**
**Phase 3: $300 per hour**

Mr. Goebel has also submitted hours billed by an associate attorney in his firm. Mr. Goebel has billed associate hours at the rate of $175 per hour. As Mr. Goebel's submission reflects, associate attorneys are generally less experienced and knowledgeable than partners or lead attorneys. The court takes judicial notice of the declaration of Guylyn R. Cummins which was filed in San Diego County Superior Court in 1997 and submitted by plaintiff to the court as evidence in this case. In this declaration, Ms. Cummins states that a junior attorney in the firm of Gray Cary Ware & Freidenrich billed at $115 per hour. (*Plaintiff's Notice of Lodgment in Support of Motion for Attorney 's Fees*, Exh. at 3.) In light of the court's reasonable rates for Mr. Goebel, the lead attorney for plaintiff in this matter, and the prevailing market rate for associate work in the San Diego area, the court finds a corresponding decrease in Mr. Goebel's requested associate rate is reasonable and warranted by the market. Therefore, the court sets the reasonable hourly rate for associates working for Mr. Goebel as follows:

**Phase 1: $100 per hour**
**Phase 2: $125 per hour**
**Phase 3: $150 per hour**

Mr. Goebel has submitted 3.5 hours, a relatively small number of hours billed by a paralegal in his office at $60 per hour. Mr. Goebel was hired as trial counsel,

and the trial stage of a case is very document-intensive because of discovery, depositions and court filings. Therefore, the court finds that the relatively small number of hours billed by a paralegal in Mr. Goebel's law office justifies the rate of $60 per hour.

Accordingly, the court sets the following reasonable hourly rates for Mr. Goebel and those working under him.

[TABLE OMITTED]

b. Kenneth Chesebro

Mr. Chesebro has submitted a variable billable rate for his work on this case. He seeks a rate of $285 per hour from August, 1992, when he began consulting with Mr. Goebel, through mid-1993. Mr. Chesebro raised his rate to $300 per hour in June, 1993, and to $350 per hour in January 1998. Mr. Chesebro's practice consists primarily of constitutional and appellate litigation. In contrast with Mr. Goebel, who has been practicing for approximately thirty years, Mr. Chesebro has been practicing for only approximately ten years. Although Mr. Chesebro asserts that there are currently no attorneys practicing in the San Diego area "who have a level of skill, experience, and reputation comparable to [his] own," (*Amended Chesebro Decl.* at 10.) the court disagrees. In support of his request, Mr. Chesebro has included declarations from attorneys practicing in San Francisco and Los Angeles who assert that between $285 and $350 per hour is a reasonable rate. The Supreme Court has held that reasonable fees under 42 section 1988 "are to be calculated according to the prevailing market rates in the relevant community," taking into account the type of practice, the experience of the attorney, and the community in which the attorney practices. *Blum v. Stenson*, 465 U.S. at 895 n.11.

The court is not persuaded by Mr. Chesebro's assertion that no attorneys currently practicing in the San Diego area are comparable to him in terms of

reputation and experience. For instance, the County submitted the declaration of a San Diego attorney who graduated from Yale Law School, clerked for a district court judge, and worked as a civil trial attorney at the United States Department of Justice in Washington, D.C. (*Opposition*, Exh. C.) The court takes judicial notice of all declarations submitted by the county, as the declarations were filed in San Diego County Superior Court and the United States District Court for the Southern District of California in other matters. (*Opposition*, Exh. B-D.) The attorney in the county's declaration was lead counsel for the United States in the complex, multidistrict Agent Orange litigation. (Id. at 2.) The attorney also worked in the Office of Independent Counsel on the Iran-Contra matter. (*Id.* at 3.) Certainly, this is an attorney with a comparable, national practice and experience handling complex litigation; this attorney billed $225 per hour in 1996.

Additionally, Mr. Chesebro's legal experience weighs against a finding that his requested hourly rate is reasonable. Mr. Chesebro has been practicing constitutional and appellate law for approximately ten years. In contrast, the attorneys who submitted declarations on behalf of Mr. Chesebro have been practicing for a significantly longer period of time. For example, plaintiff has provided as evidence a declaration by Guylyn R. Cummins, a constitutional law expert who has been practicing for fifteen years, in which Ms. Cummins states that she billed her clients at $250 per hour in 1997. In addition, the declaration states that Marcelle Mihaila, an appellate specialist who has also been practicing for substantially longer than Mr. Chesebro, billed at $300 per hour. Mr. Chesebro has requested recovery at $300 per hour for Phase Two, from fall of 1995 to summer of 1998, and at $350 per hour for Phase Three, from fall of 1998 to spring of 1999. The court finds that it would be excessive to allow Mr. Chesebro to recover the same rate as a lawyer who has been practicing for substantially longer than he has. Accordingly, the court finds that a reasonable hourly rate

for Mr. Chesebro during Phase Two is $200 per hour.

Finally, the court notes that Mr. Chesebro did not enter into a written fee agreement with the plaintiff until the middle of Phase Three, in December, 1998, leaving little or no documentation as to his fee arrangements with Mr. Schneider or any agreement as to hourly rate. Mr. Chesebro has also failed to submit declarations that he has billed and collected the amount he presents as his customary billing rate. The primary case Mr. Chesebro references as comparable to the instant matter is *Meilicke v. County of Los Angeles*, 1991 Cal. App. LEXIS 747 (June 23, 1991), rev. denied. op. withdrawn by order of ct., 1991 Cal. LEXIS 4628, *cert. denied*, 502 U.S. 1099 (1992). Although no fee award was ruled on by the court, Mr. Chesebro states he computed the lodestar in that matter to be $180,275.00, paid by defendants for his work on that case. (Supplemental Chesebro Declaration, ¶ 2). Counsel for plaintiff in that case were Laurence H. Tribe and Mr. Chesebro. The court notes that the hourly rate charged by Mr. Tribe, who has been arguing constitutional issues before the United States Supreme Court for as long as Mr. Chesebro has been in practice and is a nationally recognized constitutional law scholar, is much higher than the rate at which Mr. Chesebro bills his clients. Given this discrepancy, and the fact that Mr. Chesebro does not include the number of hours he billed to reach the lodestar figure in the *Meilicke* case, the comparison is of little use to the court in determining a reasonable rate for Mr. Chesebro's services.

Accordingly, taking into account the entirety of the Kerr factors, the declarations presented by both parties, as well as the nature of the work done and the experience of the attorney in question, the court sets the reasonable hourly rate for Mr. Chesebro as follows:

**Phase 1: $150 per hour**
**Phase 2: $200 per hour**
**Phase 3: $300 per hour**

Mr. Chesebro has also submitted hours billed by

four contract workers who are junior attorneys. None of the contract workers were out of law school for more than eight years when they worked on this case for Mr. Chesebro. One of the contract workers had graduated from law school less than one year before assisting Mr. Chesebro on this case. These contract workers are not associates of Mr. Chesebro. Unlike the associates who worked on this case and are employed by the "Law Offices of Louis Goebel," the contract workers hired by Mr. Chesebro on a case-by-case basis are not his associates. They do not receive a full package of employee benefits such as retirement plans, office space, resources, or other benefits. Mr. Chesebro does not pay any overhead costs for them. In his written fee agreement of December, 1998 with Mr. Schneider, Mr. Chesebro states that all sums payable for services provided by individuals working under him are payable directly to him. The court notes that Mr. Chesebro has not submitted any documentation of his compensation arrangements with any of the contract workers, law students, or paralegals he hired to work on this case. Mr. Chesebro seeks to recover more than the amount he paid these individuals even though there are few, if any, of the indicia that would justify Mr. Chesebro making a profit on their work at the expense of the County. In a letter dated August 3, 1999, the County strenuously objects to Mr. Chesebro's "charging between two and three times as much for independent contractors as their actual compensation."

Mr. Chesebro had different compensation arrangements with each of the contract workers. Two were paid $40 per hour and Mr. Chesebro seeks to recover $100 per hour for their work. During the August 27, 1999 oral argument, Mr. Chesebro stated that the third contract worker, Mr. Hartley, was paid $50 per hour for his work in the spring of 1995 on the summary judgment motion, and that it was not until later in 1995 when Mr. Hartley switched his payment arrangement with Mr. Chesebro to a contingency fee. Mr. Chesebro seeks to recover $125 per hour for Mr. Hartley's work.

The court finds that $50 per hour is the market rate, but under the circumstances, the court will authorize recovery at $75 per hour for Mr. Hartley's work.

The fourth contract worker, Peter Cohen, was not paid at all at the time services were rendered in 1993 and 1994, but he and Mr. Chesebro agreed that he would be paid out of the court's award of fees and expenses. Mr. Chesebro seeks to recover $150 per hour for Mr. Cohen's work. Mr. Cohen states in his declaration that his hourly rate at Choate, Hall & Stewart as a lawyer with 4 years of experience in 1990 was $150 per hour. Mr. Chesebro, unlike the law offices of Choate, Hall & Steward pays no overhead costs for Mr. Cohen's services. Nor does Mr. Chesebro provide his clients with the resources and conveniences that are available at a law firm such as Choate, Hall & Stewart and justify billing associates' time at a higher rate than the associates are paid. In addition, Choate, Hall & Stewart is a law firm in Boston, not San Diego, and therefore its billing practices are not demonstrative of "the prevailing market rates in the relevant community." *Blum v Stenson*, 465 U.S. at 895 n.1. Because Mr. Chesebro has not justified why he should make a substantial profit off of the contract workers' work, the court finds that recovering $100 to $150 per hour for these individuals' work is excessive.

Plaintiff has provided the court with a declaration by Guylyn Cummins, in which Ms. Cummins states that the standard rate for a junior attorney in the firm of Gray Cary Ware & Freidenrich was $115 per hour in 1997. The court notes that the rate 0 f $115 per hour was the rate at which a large San Diego firm billed a junior attorney, and should be higher than the hourly rate which Mr. Chesebro recovers for work done by the contract workers he hired.

To set a reasonable billing rate, the court must consider "the prevailing market rates in the relevant community." ld. The market rate for an independent contractor's services is what a willing person would work for. The individuals who worked for Mr. Chesebro are independent contractors, and if Mr. Chesebro was not

paying the market rate, they would have found work elsewhere. If these contract workers were associated with Mr. Chesebro in a law office, as in the case of Mr. Goebel's associates, then the market rate for their services would be higher. The court finds that Mr. Chesebro has not demonstrated why he should make a profit off of the contract workers he hired or why the market rate for their services is not what he paid them. Nevertheless, the court will allow a recovery to Mr. Chesebro of more than what he paid the contract workers. Accordingly, the court sets the reasonable hourly rate for Mr. Chesebro's contract workers as follows:

**Phase 1: $75 per hour**
**Phase 2: $100 per hour**

Mr. Chesebro has submitted a substantial number of hours billed by two paralegals working for him on this matter. Mr. Chesebro paid the paralegals $30 per hour for their work on this case and seeks to recover a variable rate of between $30 and $65 per hour. The two paralegals hired by Mr. Chesebro, one of whom is Donald Chesebro, are not permanent employees of Mr. Chesebro. Mr. Chesebro had no costs, such as employee benefits or office maintenance or facilities in conjunction with his hiring the paralegals. The paralegals do not receive any of the employee benefits that are provided to paralegals who work for a law firm and justify the employer's billing their work to clients at a higher rate. As independent contractors, the market rate for their work is demonstrated by Mr. Chesebro's payment to them. If Mr. Chesebro paid them less than the market rate, then they would have worked elsewhere. Therefore, the amount Mr. Chesebro paid the paralegals is the market rate for their work. In the case of paralegal work, to which the Kerr factors such as (2) difficulty of the legal questions involved, (4) preclusion of other employment due to acceptance of the case, and (9) experience and reputation of the attorney, do not easily apply, the market rate is the

best indicator of what is a reasonable fee. See *Kerr*, 526 F .2d at 70; see also *Blum v Stenson*, 465 U.S. at 895 n.ll. Therefore, the court finds that a reasonable fee for the paralegals' work is the $30 per hour that Mr. Chesebro paid them.

Mr. Chesebro hired two law students to work on this case during the first stage, in 1993. He seeks to recover $85 per hour for the law students' work. Under a totality of the circumstances, including such factors as (3) the skill required to perform the legal service properly, (5) the customary fee, (8) the amount involved and the results obtained, and (11) the nature and length of the professional relationship with the client, the court finds a recovery of $85 per hour for law students excessive and unreasonable. See *Kerr*, 526 F .2d at 70. The law students were working on the briefing and oral argument in the first appeal, most of which focused on legal arguments upon which Mr. Schneider never prevailed. Mr. Chesebro has not demonstrated that the law students had any extraordinary skills or a relationship with the client. Nor has Mr. Chesebro shown that the customary fee for law students is $85 per hour. Mr. Chesebro's own payment records reflect that he paid one law student working for him $20 per hour and the other $40 per hour. Mr. Chesebro paid no overhead costs in conjunction with hiring the law students, and they are not permanent employees. The rate at which Mr. Chesebro paid them is the market rate. Therefore, the court finds that the amount Mr. Chesebro paid the law students is an appropriate amount for him to recover from the County. Accordingly, the court will allow recovery of billed law student time at $20 or $40 per hour, depending on what Mr. Chesebro paid each law student.

The court sets the following reasonable hourly rates for Mr. Chesebro and individuals working with him. The court notes that, given Mr. Chesebro's primary role in this case as appellate specialist, and Mr. Goebel's high level of skill and experience as a trial lawyer, a total award of 882 hours for Mr. Chesebro is a very

substantial recovery. The court also notes that it allowed recovery for a large number of hours for law students and contract workers in Phase One. Accordingly, Mr. Chesebro's Phase One recovery is 610 hours for the appeal of a single summary judgment motion, while his Phase Two recovery is 208 hours for the appeal of a four-day jury trial. Given the court's allowance of a relatively large number of hours, the court finds that the hourly rates for the work performed by Mr. Chesebro and those working under him are reasonable and appropriate.

[TABLE OMITTED]

3. Lodestar Figure

Plaintiff has requested a "lodestar" multiplier to account for the delay in payment of attorney's fees and costs, based on an interest rate of 10%. Plaintiff relies on *Missouri v. Jenkins*, 491 U.S. 274, 17 281-83 (1989) as authority to support his contention for an upward adjustment. However, the Court in *Missouri* stated only that an such an enhancement, "where appropriate," constitutes part of a reasonable attorney's fee. *Id.* At 282. It remains in the court's discretion to determine what type of enhancement is appropriate, as the Supreme Court has stated: "We reemphasize that the district court has discretion in determining the amount of a fee award." *Hensley*, 461 U.S. at 437. The County has strenuously objected to plaintiffs request for a multiplier to increase the overall amount of attorney's fees and costs. The court agrees that such a multiplier would yield an excessive award, but is willing to consider an appropriate award of interest on the Phase One amount. Accordingly, after fully considering the law and all evidence provided to the court by the parties, the court sets the following lodestar figures.

[TABLE OMITTED]]

B. Reduction for Limited Success

The Supreme Court has held that it is appropriate and necessary for the district court to make adjustments in awards to take into account a plaintiffs overall success. See *Hensley*, 461 U.S. 434, 435. It is well within the district court's discretion to make such an adjustment. See *Schwarz v. Secretary of Health & Human Services*, 73 F .3d 895, 902 (9th cir. 1995). "[T]he product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiffs [unsuccessful] claims were interrelated, non- frivolous, and raised in good faith." *Hensley*, 461 U.S. at 436.

In the instant matter, the County urges the court to decrease the plaintiffs award of attorney's fees for limited success. The County presents a variety of reasons for such a reduction. Mr. Schneider originally sued ten individual defendants, against whom he did not prevail. Although plaintiff spent substantial time during the first phase of the case pursuing a Fourth Amendment claim for search and seizure violations; summary judgment was granted for defendants on this claim, and upheld on appeal to the Ninth Circuit. Plaintiff also originally demanded punitive damages and damages for emotional distress, lost income and profits. Plaintiff did not recover damages for any of those claims. Finally, plaintiff brought claims of fraud and statutory violations against defendants, and did not succeed on those claims, either. (*Opposition*,3-4.)

Although plaintiff was successful on his takings and procedural due process claims, in light of his unsuccessful pursuit of various other claims the court finds it is appropriate and reasonable to decrease the attorney's fee award, in Phase One only, by 25%. The court especially looks to the Fourth Amendment claim, which was one of the primary claims in plaintiffs original complaint, and which was dismissed on summary judgment, in making this reduction. The court therefore awards plaintiff 75% of the lodestar in Phase One as a

reasonable attorney's fee.

[TABLE OMITTED]

C. Interest

Plaintiff requests a multiplier of 10% to account for delay in payment and cites *Missouri v. Jenkins*,491 U.S. at 281, as support for an upward adjustment. The Supreme Court in Missouri did note that an attorney's fees award may be adjusted for delay in payment. *See Missouri*, 491 U.S. 274, 282, citing *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987). However, the Court also specifically noted that a district court may compensate for delayed payment either through an award of interest or by adjusting the fee rate. *Id.* The court, in its discretion, will both award interest and adjust the fee rate to accommodate the delay in payment. However, the court finds that plaintiff has not demonstrated that 10% is an appropriate rate of interest.

Plaintiffs basis for a 10% interest rate on delayed payments is a declaration of an attorney in the law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabin in which the attorney states that the firm imposes a service charge on balances outstanding for more than thirty days after the initial invoice date. However, the circumstances of this case can be distinguished from those of the average case handled by a law firm such as Howard, Rice. The court notes that the usual assumption under which lawyers are hired is that the lawyer will receive payment when services are rendered. However, in this case, plaintiff was not assured of receiving an award until December 21, 1998. In addition, the written fee arrangements between plaintiff and his attorneys did not state that plaintiff would be charged a rate of 10% interest on overdue payments: on the contrary, the premise of the fee arrangement was that payment would be delayed until the court made an award of reasonable attorneys fees and expenses.

The court has already accounted for delay in payment by scaling the fee rate over time, to reflect the rising market rates. Mr. Goebel and Mr. Chesebro's rates range from $150, to $200, to $300; similarly, rates for associate attorneys and contract workers range from $100/$75, to $100/$125, to $150. Because this case spans eight years, the court finds that it is appropriate to award interest for the substantial delay in payment for the first years of the case. Therefore, the court will award interest on the Phase One lodestar, which covers the years 199 I to 1995. The court finds that an appropriate rate of interest is the post-judgment rate of 4.545%, particularly since liability was not determined until December 21, 1998. Accordingly, the court will award interest at a rate of 4.545% on the Phase One lodestar only.

[TABLE OMITTED]

D. Costs and Expenses

1. Louis Goebel

Mr. Goebel has requested $31,268.41 in costs and expenses for the duration of this case. The County objects to $25,107.50 of Mr. Goebel's requested costs. The court finds that, pursuant to 42 U.S.C. section 1988, costs may be recoverable as part of the award to a prevailing party. See 42 U.S.C. section 1988. Recoverable costs under Section 1988 may include witness costs, photocopies, depositions, travel costs, and telephone costs. *See Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982) (photocopies, travel and telephone costs recoverable); *Alflex Corp. v. Underwriters Laboratories, Inc.*, 914 F.2d 175, 177-78 (9th Cir. 1990) (deposition costs recoverable); *Burt v. Hennessey*, 929 F.2d 457, 459-50 (9th Cir. 1991) (photocopying, expert witness fee, exhibit expenses recoverable). In order to be recoverable, costs must be reasonable and necessary for effective and competent representation. *See Thornberry*, 676 F.2d. at 1244 (9th Cir. 1982); *Robins v. Scholastic Book Fairs*, 928 F.Supp. at 1035.

Mr. Goebel's itemized expenses all fall within appropriate categories for consideration as recoverable. Plaintiff has already been awarded $8,100.07 through the Clerk of Court's taxing of costs and requests the court deduct this amount from any costs and expenses awarded to Mr. Goebel by the court. (Plaintiff's Reply at 7.) The court therefore awards Mr. Goebel $31,268.41 in costs and expenses, minus $8,100.07 already awarded.

[TABLE OMITTED]

2. Kenneth Chesebro

Mr. Chesebro has requested $14,961.71 in costs and expenses for the duration of this case. The county disputes $7,747.70 of those expenses. Initially, the county objects to long distance telephone charges

accrued prior to Mr. Chesebro's formally agreeing to consult with Mr. Goebel on this case. The court agrees such charges are not reasonable, and deducts $15.17 for those charges.

In addition, the court will disallow travel and hotel expenses accrued when Mr. Chesebro personally attended the Pre-Trial Conference on December 16, 1998. The court encouraged Mr. Chesebro to appear at the Pre-Trial Conference telephonically, as personal attendance and the resulting expense was unnecessary. Although it was Mr. Chesebro's decision to attend the Pre-Trial Conference in person, the court will not approve travel and hotel expenses. Therefore, the court disallows $997.00. Accordingly, the court awards **$13,949.54** in costs and expenses to Mr. Chesebro.

[TABLE OMITTED]]

E. Final Award

The court has taken into careful consideration plaintiffs arguments in support of Mr. Goebel's and Mr. Chesebro's calculations of their attorneys fees and expenses. The court has also reviewed the County's numerous objections to plaintiff's requested fees and expenses. In particular, the County points out that during Phase One and Phase Two of the case, Mr. Chesebro had a total of seven different individuals working under him. The County alleges that work done by the contract workers, law students, and paralegals hired by Mr. Chesebro was duplicative. The County also alleges that the number of hours for which Mr. Chesebro requests payment is disproportionate to his role in the case. The County argues that it was unnecessary for both Mr. Goebel and Mr. Chesebro to attend the depositions, pretrial conference and trial to determine damages during Phase Three of the case. The County asserts that this was a simple trial on the issue of the market value of the buses, motorhomes, and automobiles removed from plaintiffs lot, but it occurred after a finding of

liability, and therefore grounds for recovery of attorney's fees, was established. The court agrees.

Therefore, after fully considering the papers filed, the law, and the totality of the circumstances, the court makes a final award to plaintiff Schneider of $136,626.44 in attorney's fees and $31,268.41 in costs for Louis Goebel and $97,140.37 in attorney's fees and $13,949.54 in costs for Kenneth Chesebro, for a total award of $278,984.76. The jury award in this case was $67,795.50, with a prejudgment interest award of $34,145.54, for a total award of $l 01,941,04. The court notes that the attorney's fees award is over two and one-half times the plaintiffs recovery for actual damages and interest. The court is extremely familiar with this case, has given thoughtful and deliberate consideration to the arguments of all parties, and finds in the totality of the circumstances that a total award of $278,984.76 is fair and reasonable.

[TABLE OMITTED]]

IT IS SO ORDERED.

DATED: 9/28/99

/s/ Marilyn L. Huff
MARILYN L.HUFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

**FILED**
00 MAR 16 PM 1:55

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| LOUIS SCHNEIDER, | ) | |
| | ) | CASE NO. 90-CV-1738 H |
| Plaintiff, | ) | |
| vs. | ) | **ORDER GRANTING** |
| | ) | **IN PART PLAINTIFF'S** |
| COUNTY OF SAN DIEGO, | ) | **MOTION FOR** |
| | ) | **RECONSIDERATION** |
| Defendant. | ) | |

On March 31, 1999, plaintiff Louis Schneider filed a motion for an award of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988(b). On September 29, 1999, the Court issued an order granting in part and denying in part plaintiff's motion for attorneys' fees and finding that a total award of $278,984.76 to plaintiff's lawyers, Mr. Goebel and Mr. Chesebro, is fair and reasonable ("the Order"). On October 29, 1999, plaintiff filed a motion for reconsideration of the Court's Order. On December 20, 1999, the County filed an opposition to the motion for reconsideration in which the County strenuously opposed plaintiff's arguments. The County reiterated the objections it has made to plaintiff's request for attorneys' fees and expenses since the County filed its original opposition in May of 1999. The Court has taken into consideration the submissions from plaintiff and the County in making its determination to grant in part and deny in part the motion for reconsideration. Based on the Court's reconsideration, the Court finds that a total award of $305,617 .30 is fair and reasonable.

**Background**

Plaintiff filed this action under 42 U.S.C., § 1983 on December 13, 1990, alleging violation of his civil rights. Mr. Schneider owned a 1,4 acre lot in a rural, agriculturally zoned area of San Diego County, near the city of Oceanside. Mr. Schneider did not reside on the property, but rented out the house located on the lot, and parked nine buses, two motorhomes, and two automobiles on the lot. The vehicles were visible from the public road that runs in front of the lot. After receiving a variety of complaints about the vehicles, the County investigated and determined the vehicles violated county zoning ordinances. The County posted a "Notice And Order To Abate" on the property, which Mr. Schneider appealed. At the hearing before the County Abatement Board, the hearing officer determined Mr. Schneider had violated San Diego County zoning ordinances, and that his violations constituted a public nuisance. Mr. Schneider was given 30 days to abate the nuisance. When Mr. Schneider did not remove the vehicles, the County towed the vehicles from the lot and later destroyed them.

Mr. Schneider filed suit against the County and the towing company, Reybro, Inc., under 42 U.S.C. section 1983. Mr. Schneider alleged violations of his civil rights, including violations of procedural due process, Fourth Amendment search and seizure violations, and a variety of state law claims. The court granted summary judgment in favor of defendants and dismissed the case. On appeal to the Ninth Circuit, the Court of Appeals held that Mr. Schneider's Fourth Amendment rights were not violated. However, the Ninth Circuit reversed the grant of summary judgment on procedural due process grounds, and remanded to the district court.

The matter proceeded to trial in this Court, and the jury reached a verdict for defendants. Mr. Schneider appealed to the Ninth Circuit this Court's denial of his motion for judgment as a matter of law. The Ninth Circuit, vacating the jury verdict, remanded to the

district court with instructions to grant the motion.

On December 21, 1998, this Court entered judgment as a matter of law as to liability on Mr. Schneider's claims of takings and procedural due process violations. On January 20, 1999, the Court entered a stipulation and order as to the value of four vehicles. A subsequent trial was held, on damages only, on nine remaining vehicles, and a total verdict was entered for Mr. Schneider in the amount of $67,795.50 The court also granted Mr. Schneider's motion for prejudgment interest, awarding prejudgment interest in the amount 01'534,145.54 for a total award of $1O1, 941.04.

Plaintiff filed a motion pursuant to 42 U.S.C. §1988(b) on March 31, 1999 to recover reasonable attorneys' fees and expenses incurred by his trial lawyer, Louis E. Goebel, and his appellate lawyer, Kenneth J. Chesebro. Over the next six months, the issue of reasonable attorneys' fees and expenses was heavily briefed in order to ensure that the Court had sufficient information to apply the factors set out in *Kerr v. Screen Extras,* 526 F.2d 67, 70 (9th Cir. 1975). In *Kerr*, the Ninth Circuit stated that, in calculating a reasonable attorneys' fee, the district court should take into account: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Kerr*, 526 F .2d at 70.

In its opposition papers filed in May of 1999, the County objected to the reasonableness of the fee petition. Under *Kerr* factor (1) the time and labor required, the County objected to the large number of hours submitted for recovery by Mr. Chesebro and Mr. Goebel. *See*

*County's Opposition to Goebel Motion for Attorneys' Fees* at 8-11; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 9. In addition, the County objected to the "clustered entries" submitted by Mr. Chesebro because the block billing in the records he filed with the Court does not provide a sufficiently detailed account of how much time was spent on specific tasks. *See County's Opposition to Chesebro Motion for Attorney's Fees* at 10-12. Under *Kerr* factor (2) the novelty and difficulty of the questions involved, the County objected to Mr. Chesebro's request to recover for 587 hours for work performed by seven different individuals (contract workers), as this large number of hours reflects duplication of effort. *See id.* at 10-12. With regard to *Kerr* factor (3) the skill requisite to perform the legal service properly, the County objected to Mr. Chesebro's request to recover for time spent and expenses incurred in preparing for and attending the one-day trial on damages that occurred in 1999, as Mr. Goebel was "adequately handling all such matters." *See id.* at 9-10, 18. Under *Kerr* factor (4) the preclusion of other employment by the attorney due to the acceptance of the case, the County objected to the hourly rates at which Mr. Chesebro sought to recover for the work he performed, especially since he delegated tasks to four different contract attorneys and much of his time was spent in reviewing the work of others. *See id.* at 12.

In relation to *Kerr* factor (5) the customary fee, the County objected to the hourly rates requested by Mr. Goebel and Mr. Chesebro for their work and the work of those assisting them on the case as excessive and substantially higher than the prevailing market rate. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 6-8; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 6-8. Under *Kerr* factor (6) whether the fee is fixed or contingent, the County objected to the lack of documentation of a fee agreement between Mr. Chesebro and Mr. Schneider that authorized other lawyers to provide services under both hourly and

contingent arrangements. See County's Notice of Lodgment in Support of Opposition to Motion for Attorneys' Fees, Exh. E. With regard to *Kerr* factor (7) time limitations imposed by the client or the circumstances, the County objected to any recovery at all for the contract workers hired by Mr. Chesebro, as their work in this case resulted in duplication of effort. See County's Opposition to Chesebro Motion for Attorneys' Fees at 10. Under Kerr factor (8) the amount involved and the results obtained, the County objected to plaintiff's counsel's request for attorneys' fees for all time spent on the case because many of plaintiffs claims were dropped or rejected and a corresponding decrease in the attorneys' fee award is necessary. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 2-5; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 2-5.

Under *Kerr* factors (9) the experience, reputation, and ability of the attorneys and (11) the nature and length or the professional relationship with the client, the County objected to Mr. Chesebro's request to recover for any of the hours spent by law students on the case, much less recovery at the requested rate of $85 per hour. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 11. Under *Kerr* factor (12) awards in similar cases, the County objected to the evidence submitted by plaintiff's counsel and presented its own evidence (of Court-awarded attorneys' fees) indicating the range for a reasonable award of attorneys' fees in this case. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 7, Exh. B-D; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 6- 7, Exh. B-H.

In response to the County's objections, and in order to gather sufficient information to apply the *Kerr* factors, the Court ordered several phases of supplemental briefing. On April 16, 1999, the Court ordered plaintiff's counsel to submit fee agreement letters and copies of any orders from the Ninth Circuit remanding the disposition of attorneys' fees. On July 21, 1999, the Court ordered

plaintiff's counsel to submit payment stubs documenting payments to any law students for work done on the case. On July 23, 1999, the Court ordered plaintiff's counsel to submit original, contemporaneous billing records for all time billed. Finally, on September 3, 1999, the Court ordered Mr. Chesebro to submit a list of contract workers who performed work on the case and any II correspondence, memos, letters, or other documents addressing fees or his billing arrangement with plaintiff.

On September 29, 1999, the Court issued its Order granting in part and denying in part plaintiff's motion fur attorneys' fees and expenses, The Court found that, under the totality of the circumstances, a total award of $278, 984 is fair and reasonable. On October 29, 1999, plaintiff filed the instant motion for reconsideration of the Court's Order. The County filed its opposition on December 20, 1999, reaffirming the objections it had made throughout this litigation to the reasonableness of plaintiff's counsel's request for attorneys' fees and expenses. Plaintiff filed a reply brief on January 18, 2000. On February 4, 2000, the County filed objections to portions of plaintiff's reply brief. The Court has reviewed the papers submitted by the parties.

**Discussion**

I. Legal Standard

A. Legal Standard for a Motion for Reconsideration

Under the Civil Local Rules for the Southern District of California, an application for reconsideration of a court's order must show "what new or different facts and circumstances are claimed to exist which did not exist, or were not shown, upon such prior application." Local Rule 7.1(I)(1) titled "Application for Reconsideration." Similarly, Ninth Circuit precedent clearly states that, absent highly unusual circumstances, the court will grant a motion for reconsideration only if the court

(1) is presented with newly discovered evidence
(2) committed clear error or the initial decision was manifestly unjust, or
(3) if there is an intervening change in controlling law.

*See School District No. 1, Multonmah County v. AC&S, Inc*, 5 F.3d 1255, 1263 (9th Cir. 1993). The instant motion for reconsideration contains documents that were easily accessible to plaintiff at the time the original motion was being litigated. "The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence.'" *Id.* The Court notes that nearly six months were spent in resolving plaintiff's motion for attorneys' fees and expenses and lengthy papers were filed in support of that motion, including supplemental briefing requested by the Court. The Court also finds that plaintiff has not provided an adequate explanation for why the supporting evidence now submitted with the motion for reconsideration was not presented to the Court in the original motion.

In the instant motion for reconsideration, plaintiff has failed to demonstrate that there has been (1) newly discovered evidence; (2) clear error by the Court; or (3) a change in the law. Accordingly, plaintiff has failed to meet the high standard for a motion for reconsideration. However, in order to ensure that the Court's award or attorneys' fees and expenses is as fair and reasonable as possible, the Court has permitted plaintiff and the County to submit additional declarations and arguments and has reviewed them.

B. Legal Standard for an Award of Attorneys' Fees and Expenses

Under 42 U.S.C. § 1988(b), district courts may award a reasonable attorney's fee to prevailing parties in civil rights litigation. The statute permits an award of "reasonable," and not "actual" attorneys fees. Therefore it is not sufficient for attorneys to provide the Court with the number of hours spent and a corresponding billing rate; attorneys requesting fees have the burden of proving that the time spent and hourly rate are reasonable. The Supreme Court has recognized that district courts retain great discretion in calculating the reasonableness of the fee award. "We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424,437 (1983).

The initial calculation is reached by determining the "lodestar" figure, which is the number of hours reasonably expended multiplied by a reasonable rate. *See Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). In calculating the lodestar amount, the district court should take into account the totality of the circumstances, utilizing the pertinent factors set forth in *Kerr v. Screen Extras Guild*, 26 F.2d 67, 70 (9th Cir. 1975), *See McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)); see also *Robins v, Scholastic Book Fairs*, 928 F.Supp. 1027, 1031 (D. Or. 1996).

When determining a reasonable number of hours, courts should exclude hours not reasonably expended. "Counsel for the prevailing party should exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude hours from his fee submission." *Gates*, 987 F.2d at 1397, citing

*Hensley*, 461 U.S. at 433-34. The moving party bears the initial burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. *Id.* at 433.

To set a reasonable billing rate the court must consider the "prevailing market rates in the relevant community" and determine what a lawyer of comparable skill, experience and reputation would command in the relevant community. *Blum v. Stenson*, 465 U.S. 886,895 n.11 (1984); *see also Robins*, 928 F. Supp. at 1033. It is plaintiff's burden to produce evidence convincing the court "that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan v. Multonmah County*, 799 F.2d 1262, 1266 (9th Cir. 1986).

Once the court has computed the lodestar, the court may make adjustments in the fee award based on the level of success. *Hensley*, 461 U.S. at 434. "If. . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Id.* at 435.

In a motion for attorneys' fees, the moving party bears the burden of establishing entitlement to an award and demonstrating that the amount claimed is reasonable. *Hensley*, 461 U.S. at 437, The burden then shifts to the opposing party to rebut the moving party's evidence, *Blum v, Stenson*, 465 U.S., 886, 892 n. 5 (1984), The Court makes the final determination of a reasonable award. The Civil Rights Attorneys Fees Act, 42 U.S.C., §1988 states that "the court, in its discretion," may allow the prevailing party "a reasonable attorney's fee," "The district court is authorized under the Act to use its discretion in awarding a reasonable attorneys fee to the prevailing party to insure a fair result for both parties." *Southeast Legal Defense Group v. Adams*, 657

F.2d 1118, 1125 (9th Cir, 1981).

In this fee litigation, plaintiff's counsel requested a fee award that, under the totality of the circumstances and the *Kerr* factors, the Court found was unreasonable. The County had strongly objected to plaintiff's counsel's fee request, For example, under *Kerr* factor (1) the time and labor required, the County objected that the hours submitted by Mr. Goebel and Mr. Chesebro for recovery were excessive, given *Kerr* factor (2) the novelty and difficulty of the questions involved. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 9-11; County's Opposition to Chesebro Motion for Attorneys' Fees) at 9-13, In relation to Kerr factor (5) customary fee, the County objected to the hourly rates at which Mr. Goebel and Mr. Chesebro sought recovery. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 6-8; *County's Opposition to Chesebro Motion for Attorneys' Fees*; at 6-8. With regard to *Kerr* factor (6) whether the fee is fixed or contingent, the County objected to the lack of documentation of a specific fee agreement with Mr. Schneider authorizing individuals not licensed to practice law to assist in his case and stating whether their payment would be on an hourly or contingent basis, See County's Opposition to Chesebro Motion for Attorneys' Fees at 11.

As described in *Kerr* factor (8) the amount involved and the results obtained, the County objected to the fee petition because the majority of claims presented by plaintiff's counsel were rejected or dropped. The County argued that the award of attorney's fees should be reduced accordingly. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 2-5; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 2-5. Under *Kerr* factor (9) the experience, reputation, and ability of the attorney, the County argued that, because Mr. Goebel was an accomplished trial lawyer and Mr. Chesebro was hired as an appellate lawyer, it was unnecessary for Mr. Chesebro to join Mr. Goebel at proceedings in preparation for the short trial on damages in 1999. The

County argued that it would be excessive for the Court to pay Mr. Chesebro for the time spent and expenses incurred in his participation during this final phase of the case. County's Opposition to Chesebro Motion for Attorneys' Fees at 18-19. Under *Kerr* factor (12) awards in similar cases, the County objected to plaintiffs evidence. *See County's Opposition to Motion for Reconsideration* at 4- 7. Furthermore, the County objected to Mr. Chesebro's failure to provide the Court with contemporaneous billing records and billing entries to substantiate the hours for which he wished to recover payment. *See County's Notice of Lodgement Support of Opposition to Motion for Attorneys' Fees*, Exh. E. In addition, the County objected to the "clustered entries" in the records Mr. Chesebro submitted to the Court because block billing does not provide a sufficiently detailed account of how much time was spent on particular tasks. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 10, 12-15.

In this motion for reconsideration, Mr. Chesebro misstates the record and claims that the County conceded the reasonableness of various elements of their motion for attorneys' fees and expenses. Mr. Chesebro ignores the repeated objections of the County to the fee petition and then incorrectly argues that the Court has, *sua sponte*, raised these objections. The Court notes that during oral argument, Mr. Hill exclaimed in frustration: "I don't know what we can do other than jump up and down to make it any clearer that we have raised these objections." Accordingly, the Court rejects plaintiff's counsel's assertion that the discussion in its Order awarding attorneys' fees is *sua sponte*. The Court finds that the County's description of plaintiff counsel's conduct during this litigation is accurate: "During telephonic oral argument on the attorneys' fee motion, plaintiffs counsel (specifically Mr. Chesebro) repeatedly argued that the defendants concurred in his positions or did not oppose them. Mr. Chesebro was asked, first by defense counsel and then by the Court, to stop

misrepresenting the defendants' position. Now the reconsideration motion repeats those same arguments." *County's Opposition to the Motion for Reconsideration* at 2.

II. Analysis

Because of the progress of this case, the Court has divided it into three sections. The first phase begins when the initial complaint was filed on December 13, 1990, and extends through the first summary judgment motion by defendants, the first appeal to the Ninth Circuit, and the first trial. Phase One ends on September 22, 1995, when the Court denied plaintiffs motion for judgment as a matter of law and motion for a new trial. Phase Two begins with plaintiff's second appeal to the Ninth Circuit, and extends to the remand to this Court, on August 26, 1998. Phase Three covers time since remand to this Court up to the conclusion of the case, on May 30, 1999.

A. Lodestar

The initial calculation of attorney's fees under 42 U.S.C. section 1988 is reached by determining the "lodestar" figure, which is the number of hours reasonably expended multiplied by a reasonable rate. *See Gates v. Deukmejian*, 987 F.2d 1392,1397 (9th Cir. 1992). The court determined a separate lodestar for each of plaintiffs two attorneys, Mr. Goebel and Mr. Chesebro.

Mr. Goebel acted as primary trial counsel in this matter. He first met with the plaintiff on December 3, 1990, and represented plaintiff continuously since that time. The Court awarded Mr. Goebel $167,894.85 in fees and costs. Mr. Chesebro acted as appellate counsel in this matter. He was initially retained by plaintiff Schneider in August, 1992, when he agreed to consult with Mr. Goebel. The Court awarded Mr. Chesebro $111,089.91 in fees and costs.

1. Reasonable Number of Hours Billed

a. Louis Goebel

Mr. Goebel submitted a total of 1,232.1 billable hours for the entirety of the case. [n view of the totality of the circumstances and the *Kerr* factors, the Court found that 1209 hours billed by Mr. Goebel were reasonable. The Court disallowed 22.5 hours billed during Phase 1 of the case. Because the plaintiff was proceeding pro se at this time, the Court found that allowing recovery of those hours was not appropriate. The Court permitted recovery for the vast majority of hours submitted by Mr. Goebel. In making a determination on the number of hours to award Mr. Goebel, the Court factored in the hourly rate it set for Mr. Goebel and those working under him. In this motion for reconsideration, Mr. Goebel does not request that the Court allow him to recover for the 22.5 hours that the Court disallowed. The Court finds that the following number of hours recovered by Mr. Goebel and those working under him remains reasonable at the hourly rates determined by the Court in this order:

[TABLE OMITTED]

2. Kenneth Chesebro

In the original motion, Mr. Chesebro submitted a total of 1018.41 billable hours for the entirety of the case. In view of the totality of the circumstances and the Kerr factors, the Court approved as reasonable 882 hours for work done by Mr. Chesebro and those working under him. The Court based its determination of appropriate hours on several of the County's meritorious contentions regarding the reasonableness of hours worked.

In its opposition papers filed in May of 1999, the County objected to the hourly rate Mr. Chesebro requested for his work on this case, especially since he delegated tasks to seven individuals working under him. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 6-9, 12. The County objected to any recovery at all for work performed by contract lawyers and law

students, since there is no evidence that Mr. Schneider consented in writing 10 Mr. Chesebro hiring these individuals to work on the case. See *id.* at 11, Furthermore, the County objected to the large number of hours Mr. Chesebro requested for recovery: 417 hours for his work, 469 hours spent by contract lawyers, 79 hours or work by law students, and 39 hours spent by paralegals. See *id.* at 10-12. The County argued that this amount of hours is excessive and duplicative, given the fact that this case involved the appeal of a summary judgment, the appeal of one four-day trial, and a one-day trial on the market value of some of the vehicles from plaintiff's lot. *See id.* The County objected to the block billing and lack of contemporaneous billing entries justifying the very large number of hours for which Mr. Chesebro requested recovery. *See id.* at 12. The County objected to Mr. Chesebro recovering for time spent in 1999 (after liability and attorneys' fees were certain) attending depositions, the pretrial conference, and the trial on damages, since Mr Goebel was well qualified to represent Mr. Schneider at these proceedings. *Id.* at 9-10, 18-19.

Mr. Chesebro's *pro hac vice* application to appear in the Southern District of California was not approved by the Court until May, 1995. Mr. Chesebro provided little or no documentation as to his fee arrangement with Mr Schneider at the start of his involvement in the case, except for a reference in a fax dated February 12, 1993 that a contractual fee arrangement would be drafted. However, no such arrangement was made until December 17, 1998, when Mr. Schneider signed a written fee agreement. In the interim period, Mr. Chesebro subcontracted work to seven individuals, including two not licensed to practice law, with no written notice to Mr. Schneider. The Court notes that, once it approves Mr. Chesebro's *pro hac vice* application, Mr. Chesebro is required to comply with the standards of professional conduct for the State Bar of California. See Civil Local Rule 83.4(b) ("Every member of the bar of this court and any attorney permitted to practice in this court shall be

familiar with and comply with the standards of professional conduct required of members of the State Bar of California").

With regard to Mr. Chesebro's request to recover payment for work performed by four contract lawyers he hired to assist him in this case, the Rules of Professional Conduct for the State Bar of California state that:

> A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:
>
> (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
>
> (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable.

CA State Bar Rules of Professional Conduct, Rule 2-200. Mr. Chesebro did not obtain written consent from Mr. Schneider until December of 1998, after all of the work performed by the four lawyers he hired was completed. The Court notes that a determination of liability (making attorneys' fees a certainty) also occurred in December of 1998. Rule 2-200 of the Rules of Professional Conduct of the State Bar of California does not allow after-the-fact consent for division of legal fees.[1] *See* Rule of Professional Conduct 1-100(0)(2) ("As to lawyers from

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[1] Mr. Chesebro's retainer agreement with Mr. Schneider, dated December, 1998, states: "Association of cocounsel. You understand that I have contracted, and may continue to contract, with other attomeys for the performance of work for you and that I may pay part of the fees I receive under this agreement to such attorneys for services rendered by them. All sums payable on account of the services performed by persons under me are payable directly to me." *Plaintiff's April 5, 1999 Notice of Lodgment*, Exh. 2 at 3.

other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state.") Mr. Chesebro requested recovery for 469 hours of work by contract lawyers. The County has objected to any award of fees for these contract attorneys, as they were not admitted *pro hac vice* to this court and there was no written consent from Mr. Schneider authorizing Mr. Chesebro to hire them before they began working on the case. County's Opposition to Chesebro Motion for Attorneys' Fees at 11. Despite the County's objections, the Court, exercising its discretion, decided to award payment for 431 hours spent by the contract attorneys as part of the reasonable attorneys' fee for appellate work done in this case.

Since the start of the litigation on plaintiff's motion for attorneys' fees, the County has objected to the lack of a retainer agreement authorizing contract attorneys, law students, and paralegals to assist Mr. Chesebro. *See County' s Opposition to Chesebro Motion for Attorney's Fees* at 11. In April of 99, the County requested additional information regarding Mr. Chesebro's fee arrangement with Mr. Schneider. *See County's Notice of Lodgment in Support of Opposition to Motion for Attorneys' Fees*, Exh. E (April 27, 1999 letter from Mr. Chesebro to Mr. Hill containing information about the fee arrangement and providing to Mr. Hill "the information that [he] requested"). Mr. Chesebro requested recovery for 587 hours of time spent by individuals he hired to assist him in this case, which involved relatively simple tasks: an appeal of a summary judgment and an appeal of a four-day trial. Mr. Chesebro also requested recovery for 417 hours for work that he did on the case. Mr. Chesebro has not provided the Court with detailed billing entries that would justify such a large number of hours spent on tasks requiring a limited amount of time for completion, nor has Mr. Chesebro provided evidence that Mr. Schneider gave Mr. Chesebro written permission for him to hire contract workers and bill substantial

amounts of time for their work.[2] Mr. Chesebro provided the Court with a fee agreement between he and Mr. Schneider, dated December, 1998, that gave Mr. Chesebro permission to hire other attorneys. However, this agreement was after the fact because all of the lawyers that assisted Mr. Chesebro on the case had already finished their work by spring of 1997. The lack of a retainer agreement authorizing Mr. Chesebro to hire additional lawyers (before December of 1998) is significant given the fact that the County has objected to the duplication of effort, the high hourly fees at which Mr. Chesebro requests recovery, and the absence of contemporaneous billing records and detailed billing entries. Accordingly, the Court's consideration of the content and form of Mr. Chesebro's retainer agreement with Mr. Schneider was not *sua sponte* and is relevant to Mr. Chesebro's request to recover reasonable attorneys' fees.

The only support that Mr. Chesebro has provided for his fee request is a computer-generated invoice dated March, 1999. The Court requested the raw data used to create this invoice, such as time sheets submitted to Mr. Chesebro by the individuals working under him. However, Mr. Chesebro never gave the Court this evidence. The Court's Order awarding attorneys' fees explained that Mr. Chesebro has not produced contemporaneous billing records to the Court with detailed billing entries. Although the Court requested contemporaneous records, these were not provided. Mr Chesebro has not given the Court a sufficient explanation for why there exist no original time sheets documenting the work done by either Mr. Chesebro or the seven individuals he hired to assist him at the time that it was done. Presumably, there is back-up data containing the billing entries for work performed by the contract

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[2] "There is not one standard when one's own clients pay. and another standard when the taxpayers must pay." *County's Opposition to Motion for Reconsideration* at 19.

attorneys and law students at the time they completed this work. Since all the work performed by the contract attorneys and law students was completed by the spring of 1997, the Court is not persuaded that a computer-generated invoice dated March, 1999 is a contemporaneous billing record.

Even if the March, 1999 computer invoice is what Mr. Chesebro considers his raw billing data, the block billing entries in this invoice give little or no indication of how much time was spent on particular kinds of legal work. The invoice does not consistently separate entries by work done, but tends to group several tasks. The block billing entries are not sufficient to satisfy Mr. Chesebro's burden to demonstrate the reasonableness of hours spent on work. See *Hensley*, 461 U.S. at 433 (the moving party bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked and their reasonableness).

In the motion for reconsideration, Mr. Chesebro asserts that the Court made "sua sponte criticisms" of his billing records. This is incorrect. The County stated in May of 1999 in its opposition briefing that it objected to Mr. Chesebro's "clustered entries," which do not provide adequate support for an award of fees. *County's Opposition to Chesebro Motion for Attorneys' Fees* at 10. In response to the County's objections, on July 23, 1999, the Court ordered Mr. Chesebro to submit original, contemporaneous billing records, When Mr. Chesebro failed to follow the Court's order and simply resubmitted the March, 1999 computer invoice, the County filed a letter to the Court which stated: "This letter is necessary to preclude Mr. Chesebro from arguing that our office failed to object, and therefore waived his noncompliance with the Court's orders." County's August 3, 1999 Letter to the Court at 1. Mr. Chesebro inaccurately claims that the County did not object to his billing records and erroneously states that the Court *sua sponte* discussed his billing records.

Although Mr. Chesebro has billing records for 1991,

there is no written documentation of Mr. Chesebro's agreement to work on the case until August 24, 1992. Therefore, the Court did not allow recovery for the 6 hours spent by Mr. Chesebro in 1991. Mr. Chesebro did little substantive work on the case until 1993. For instance, many early billing entries merely record reading and analysis of cases and early court opinions. Plaintiffs first appeal occurred during Phase One and challenged the Court's grant of summary judgment for the County, and review of the record would not have been time-intensive. The second appeal occurred during Phase Two and followed a very brief trial, limited by the Court to only nine hours per side or four court days; review of this record would be necessarily limited, as well. However, during Phases One and Two of the case, Mr. Chesebro hired a total of 7 different individuals to work under him on this case, Mr. Chesebro has not provided any written agreement demonstrating that Mr. Schneider gave his permission for these individuals to be hired until after the fact, in a fee agreement dated December, 1998.

An examination of the billing invoice submitted by Mr. Chesebro exhibits a high rate of delegation of work, resulting in duplication of efforts and a lack of efficiency. Under *Kerr* factors (1) the time and labor required, (2) the novelty and difficulty of the questions involved, and (3) the skill requisite to perform the legal service properly, the County challenged Mr. Chesebro's inclusion of time spent supervising law students and contract workers in his total hours as duplicative. *See County's Opposition to Chesebro Motion for Attorneys' Fees*, at 11-12. The amount of work that was involved in preparing and arguing the appeal of one summary judgment and one four-day trial is limited and the issues involved were not difficult. It is not clear why Mr. Chesebro needed to delegate the limited work involved in this case to seven different individuals, all of whom necessarily had to spend additional time learning the facts and legal background of the case, resulting in further duplication of effort. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 12 ("Mr. Chesebro's time claimed for

work relating to work performed by other attorneys was unnecessary and duplicative, and should be disallowed.")

Therefore, the Court found that the 587 hours for which Mr. Chesebro requested payment for two paralegals, two law students and four contract attorneys is excessive, especially because Mr. Chesebro also requested payment for a total of 417 hours for himself. The Supreme Court has stated:

> "Counsel for the prevailing party should make a good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission,..Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Hensley*, 461 U.S. at 434.

The County alleged that the work performed by Mr. Chesebro and the work done by the individuals he hired had to overlap to a large degree, since there were a limited number of tasks involved in preparing for and litigating the two appeals. Mr. Chesebro has submitted only block billing entries to account for his time and the time of those individuals working under him. Some of the law students and contract workers who worked on this case were also working on different cases for Mr. Chesebro, and the County has pointed out that it is unclear from the block billing entries, especially in the case of the law students, whether the hours requested are hours reasonably spent working on Mr. Schneider's matter. *See County's August 3, 1999 Letter to the Court* at 2. The Court found that these block billing entries are not sufficient to demonstrate the reasonableness of such a large number of hours spent by several different individuals on a limited number of tasks. Therefore, the Court reduced Mr. Chesebro's requested hours for work he performed during the case by 10%. In addition, the Court reduced the hours requested for the paralegals,

law students, and contract workers in Phase One by 10% tor duplication of effort.

The County pointed out that, at the start of the case, depositions were attended by only one member of Mr. Goebel's law firm. However, after December 21, 1998, once liability was established and plaintiff was assured of an award of reasonable attorneys fees, both Mr. Goebel and Mr. Chesebro attended two depositions on January 19, 1999. *See County's Opposition to Chesebro Motion for Attorneys's Fees* at 8-9 ("Mr. Chesebro came to San Diego and unnecessarily made appearances when Mr. Chesebro was present and able to represent Mr. Schneider's interests.") Under *Kerr* factors (1) the time and labor required, and (3) the skill requisite to perform the legal service properly, the County contends that Mr. Chesebro unnecessarily joined Mr. Goebel at these two depositions, the pretrial conference on December 16, 1998 and the trial on damages on January 20, 1999. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 18-19. The trial on damages lasted one day, and addressed only the market value of the vehicles that had been removed from Mr. Schneider's property, Mr. Goebel is a skilled litigator who was more than capable of handling these simple proceedings on his own. Nevertheless, Mr. Chesebro asserted that it was necessary for him to attend the depositions, pretrial conference, and trial "as second chair to Mr. Goebel." This was unnecessary. The Court determined that $300 per hour is the reasonable rate for both attorneys' work during Phase Three. Thus, the combined hourly rate for Mr. Goebel and Mr. Chesebro at the pretrial proceedings and trial on damages is $600 per hour, which the Court found excessive. Therefore, a reduction in Mr. Chesebro's hours spent during the damages phase of the case was appropriate to calculate reasonable fees. Accordingly, the Court reduced Mr. Chesebro's hours by 25% for Phase Three for duplication of effort.

Mr. Chesebro requested recovery of 14.5 hours of paralegal-level work that he performed during Phase Three of the trial. He requested recovery for this time at

$65 per hour, in addition to the 6.44 hours in Phase Three for which he requested recovery at his attorney's rate, which the court set at $300 per hour. Phase Three began after remand to this Court. There was no appeal during Phase Three, and Mr. Chesebro's involvement as an appellate lawyer during that stage of the case was limited. The County asserts that the request for payment for the 14.5 hours of work such as faxing, copying and filing performed by Mr. Chesebro (usually considered overhead) in addition to the 110.25 hours Mr. Chesebro spent in his capacity as an attorney is unreasonable, and the Court agrees. Therefore, the Court did not allow recovery for the 14.5 hours of paralegal work performed by Mr. Chesebro during Phase Three.

In light of the law, the facts, and all the circumstances, the Court found 882 hours to be a reasonable number of hours for Mr. Chesebro's role in this matter at the hourly rate the Court awarded. The Court noted that even with the necessary reductions in Mr. Chesebro's requested hours to address duplication of efforts by Mr. Chesebro and those working under him, the Court allowed Mr. Chesebro to recover payment for a total of 610 hours in Phase One for the appeal of a single summary judgment motion, including 71 hours spent by law students. The Court also noted that while Mr. Chesebro requested recovery for 717 hours in Phase One for the appeal of one summary judgment motion, Mr. Chesebro requested recovery for 220 hours in Phase Two for the appeal of a four-day jury trial. The Court found that a total of 208 hours is reasonable for Phase Two. Finally, the Court noted that Mr. Chesebro requested recovery for 121 hours during Phase Three. The only event that occurred during this stage of the case was a one-day trial on the market value of the vehicles towed from the plaintiff's lot. Given the extensive trial experience of Mr. Goebel, Mr. Chesebro's involvement at this stage was not necessary. Nevertheless, the Court allowed Mr. Chesebro to recover payment for 64 hours during Phase Three.

Mr. Chesebro seeks reconsideration of the Court's

determination that Mr. Chesebro requested recovery for an excessive number of hours, given the amount of work that was required in this case. *See Kerr*, 526 F .2d at 70 (the first factor listed hy the Ninth Circuit to take into consideration when determining the lodestar calculation is "the time and labor required"). The Court has read the appellate briefs submitted to the Ninth Circuit and has considered all papers filed in connection with this case, including the declaration of Mr. Mayer, submitted by the plaintiff. *See Reply Notice of Lodgment in Support of Motion for Reconsideration of, Mayer Declaration.* The County has submitted a declaration of Professor Minan in support of its contention that the case was not legally complex See County's Notice of Lodgment in Support of Opposition to Motion for Reconsideration, Exh. D. The Court finds the declaration of Professor Minan more persuasive than that of Mr. Mayer, in light of the Court's familiarity with the proceedings in this case. In making this determination, the Court has taken into consideration all of the briefing by the parties and the length of time that the case was pending in the Southern District of California and at the Ninth Circuit.

After considering the papers submitted by plaintiff in the motion for reconsideration and the opposition from the County, as well as the facts and the law, the Court declines to adjust the reasonable number of hours for Mr. Chesebro's work:

[TABLE OMITTED]

2. Reasonable Hourly Rate.

a. Louis Goebel

The Supreme Court has held that reasonable fees under 42 U.S.C, § 1988 "are to be calculated according to the prevailing market rates in the relevant community," taking into account the type of practice, the experience of the attorney, and the community in which the attomey practices, *Blum v. Stenson*, 465 U.S. 886,895

and n.11(1984). Mr. Goebel requested the same billable rate for the entirety of the case but did not provide sufficient evidence showing that a court had awarded him or an attorney with his qualifications such a rate. Mr. Goebel submitted only declarations, two from his former colleagues, and one from a land-use case in the San Diego County Superior Court. The County opposed Mr. Goebel's requested hourly rate as unreasonable. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 6-8. In support of its position, the County submitted evidence in the form of declarations from attorneys in the San Diego area who have similar experience and qualifications to those of Mr. Goebel, and have worked on similar land use and zoning cases. The County's evidence showed a reasonable rate under those circumstances to range from $150 to $225 per hour. The Court took judicial notice of those declarations, which were filed in San Diego County Superior Court (between 1996 and 1998) and in the Southern District of California (in 1997). *See County's Notice of Lodgment in Support of Opposition to Motion for Attorneys' Fees*, Exh. B-D.

In its opposition to the original motion for attorneys' fees and expenses, the County also submitted a court order in which Judge Miller of this district awarded an hourly rate of $150 to a solo practitioner for civil rights litigation done in 1996 and 1997, *See id.*, Exh. D. In making its determination, the Court found more probative a court order from this district stating that a particular hourly rate was reasonable than after-the-fact declarations from Mr. Goebel's former colleagues. After considering all of the evidence, the Court determined that the reasonable rate for Mr. Goebel's work in Phase One was $150 and that the reasonable rate in Phase Two was $200. In addition, taking into consideration Kerr factor (9) the experience, reputation, and ability of the attorney, and all of Mr. Goebel's qualifications, the Court found that the reasonable rate for Mr. Goebel's work in Phase Three was $300 per hour.

Mr. Goebel requested recovery for 1,232.1 hours billed on this case, The County had objected to the

number of hours submitted by Mr. Goebel for work done by him and those working under him (*County's Opposition to Goebel Motion for Attorneys' Fees* at 9-11), but the Court permitted Mr. Goebel to recover payment for 1209 hours, almost all the hours he originally requested recovery for. The Court took into consideration the large number of hours for which it permitted recovery when it made a determination of reasonable hourly rates for Mr. Goebel.

The Court's award of a reasonable hourly rate of $ 150 for work performed by Mr. Goebel between 1990 and 1995 is confirmed by Judge Schwartz's order in the Escoboza case. *See County's Notice of Lodgment in Support of Opposition to Motion for Reconsideration*, Exh. H. The *Escoboza* case was filed in this district in 1993 and dealt with police misconduct. In this case, Judge Schwartz awarded a rate of $150 per hour for work performed by attorney Tom Adler between 1993 and 1995. At the time Judge Schwartz made this award, Mr. Adler had been a practicing trial attorney for twenty-three years. Two years before this ruling, Mr. Adler was voted Trial Lawyer of the Year. Mr. Adler's speciality, civil rights and criminal defense, is different from that of Mr. Goebel. However, the two lawyers have both been practicing for over twenty years with impressive credentials and professional success. In addition, Mr. Adler stated in his declaration in support of his fee request that it is difficult to find lawyers willing to bring police misconduct cases and that it is important, in order to ensure protection of constitutional rights, that attorneys' fee awards fully compensate the attorneys. Plaintiff's counsel made a similar statement in oral argument that attorneys will not take cases like Mr. Schneider's unless full market compensation is awarded and that Congress's intention is to award attorneys' fees so that constitutional rights will be protected. The Court finds that the attorneys' fees order in the *Escoboza* case before Judge Schwartz is relevant to the fee petition in this case, Accordingly, the Court takes Judicial notice of Judge Schwartz's 1995 order.

The Court's determination of a reasonable hourly rate of $150 for work performed by Mr. Goebel between 1990 and 1995 and of $200 per hour for work done between 1995 and 1998 is confirmed by two separate rulings from two different judges in this district. In 1997, Judge Miller awarded $150 per hour to a solo practitioner for work performed in 1996 and 1997 in civil rights litigation. In 1995, Judge Schwartz awarded $150 per hour for work done from 1993 to 1995 by a civil rights and criminal defense lawyer with over twenty years of experience.

In support of the motion for reconsideration, Mr. Goebel submitted an order issued by Judge Hyde of the San Bernardino County Superior Court in which Judge Hyde awarded Mr. Goebel $275 per hour. *See Goebel Reconsideration Declaration.* Exh. B. This order specifically awarding attorneys' fees to Mr. Goebel is relevant evidence that should have been submitted with the original motion for attorneys' fees. The Court finds that plaintiff's counsel have made no persuasive explanation for why such evidence was excluded from the original motion.[3] Mr. Goebel was on notice that the County opposed his hourly rate request as unreasonable, as the County clearly stated its position in its opposition briefing of May, 1999. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 6-8. Nevertheless, the Court will consider Judge Hyde's order, as well as the County's additional submissions regarding a reasonable hourly rate for Mr. Goebel.

Judge Hyde's order found that $275 was an appropriate hourly rate for Mr. Goebel. Goebel Reconsideration Declaration, Exh. B. This case was before the Superior Court in San Bernardino County, and therefore the rate determination of $275 per hour does not indicate that this is a reasonable hourly rate for work performed in San Diego. Therefore, an order issued by a

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[3] The Court notes that the hourly rate that Mr. Goebel requested in this fee petition is highly than the hourly rate awarded by Judge Hyde.

superior court judge in San Bernardino County is not conclusively probative of reasonable hourly rates in San Diego.

The Court had previously awarded Mr. Goebel an hourly rate of $150 for work done in Phase One, from December 1990 through September 1995. The fact that this is the identical amount that Judge Schwartz and Judge Miller of this district awarded for work performed during the relevant time frame is further confirmation of the reasonableness of this amount. Nevertheless, the Court finds that it is reasonable to increase Mr. Goebel's hourly rate for Phase One to $200, given Judge Hyde's award of $275 per hour for work performed in San Bernardino County.

In addition, the Court finds that an increase in Mr. Goebel's hourly rate for work performed during Phase Two, from the later part of 1995 through August of 1998, is appropriate. The Court had previously awarded Mr. Goebel $200 per hour. The Court will adjust Mr. Goebel's Phase Two rate to $275 per hour. The Court declines to adjust its award of $300 per hour for work performed by Mr. Goebel during Phase Three. In making this determination to increase the hourly rate awarded to Mr. Goebel for Phases One and Two, the Court has taken into consideration all of Mr. Goebel's qualifications, the totality of the circumstances, all papers filed by plaintiff and the County, and the *Kerr* factors. The Court adjusts Mr. Goebel's attorneys' fees award to reflect the following rates for work performed by Mr. Goebel:

**Phase 1: $200 per hour**
**Phase 2: $275 per hour**
**Phase 3: $300 per hour**

Mr. Goebel also submitted hours billed during Phase One by Jeff Paape, an associate attorney in his firm. The Court awarded an hourly rate of $100 for Mr. Paape, based on the declaration, submitted by plaintiff in support of the motion for attorneys' fees and expenses, of Guylyn R. Cummins which was filed in San Diego County

Superior Court in 1997 and stated that a junior attorney at a large law firm, Gray Cary, billed at a rate of $115 per hour. See Plaintiff's Notice of Lodgment in Support of Motion for Attorneys' Fees, Exh. 5 at 3. In addition, Mr. Goebel requested recovery for work performed by Robert Miller. The Court awarded an hourly rate of $150 for work performed by Mr. Miller during Phase Three.

In the motion for reconsideration, Mr. Goebel asks the Court to reconsider the hourly rates it awarded for work performed by Paape and Mr. Miller. With respect to Mr. Paape's hourly rate, the Court takes judicial notice of the order on attorneys' fees in the *Escoboza* case, in which Judge Schwartz awarded $125 per hour for work performed by a junior associate with five years of experience. *See County's Opposition to Motion for Reconsideration*, Exh. H. Mr. Paape started working on this case with Mr. Goebel when he was a third year lawyer, in 1990, and worked on it during Phase One, through 1995. Given the Court's increase in Mr. Goebel's hourly rate for work performed in Phase One, and Judge Schwartz's determination that $125 per hour is a reasonable rate for work performed by a junior attorney with approximately five years of experience, the Court adjusts Mr. Paape's rate to $125 per hour.

Mr. Goebel hired Mr. Miller to perform 7.5 hours of work during Phase Three of the case in January, 1999. Under *Kerr* factor (11) the nature and length of the professional relationship with the client, the Court notes that Mr. Miller was hired at the last stage of the case to assist with depositions. Mr. Goebel has not provided any evidence of Mr. Miller having had any prior relationship with Mr. Schneider or with the case According to Mr. Goebel's billing records, Mr. Miller's work consisted of "Additional preparation of expert witnesses; attend and defend depositions of plaintiffs expert witnesses Poole and Schweitzer." *Goebel Notice of Lodgment in Support of Motion for Attomeys' Fees*, Exh. D. The Court notes that these two witnesses had already been deposed in preparation for the first trial. In addition, Mr. Goebel and Mr. Chesebro both attended the depositions that Mr.

Miller was hired to assist in taking. The County had argued that it was unnecessary for Mr. Goebel and Mr. Chesebro to both participate in proceedings related to the second trial, much less a third lawyer. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 18-19. The Court agrees. The Court has found that the duplication or error by plaintiff's counsel during Phase Three of the case led to an excessive number or hours being submitted for payment by opposing counsel. Nevertheless, the Court has permitted recovery for all of the hours requested for Mr. Goebel's and Mr. Miller's work in Phase Three.

After considering the *Kerr* factors and the hours permitted by the Court for recovery in Phase Three, the Court awarded an hourly rate of $150 to Mr. Miller. The reasonableness of this award is confirmed by Judge Schwartz's 1995 award in the *Escoboza* case or an hourly rate or $150 for an attorney who had been a litigator for fifteen years. *See County's Notice of Lodgment in Opposition Motion for Reconsideration*, Exh. H. Mr. Miller had been practicing for thirteen years when he worked with Mr. Goebel in 1999. Given Judge Schwartz's award of $150, the *Kerr* factors, and the totality of the circumstances, the Court declines to adjust the hourly rate of $150 that it has awarded for Mr. Miller's work.

The Court has carefully reviewed the arguments and supporting evidence presented by Mr. Goebel in support or the motion for reconsideration or the Court's hourly rates for him and those working under him, and the Court has also considered the County's submissions in response to the motion. Based on all the qualifications of Mr. Goebel, Mr. Paape, and Mr. Miller, the facts, and the law, the Court finds that reasonable hourly rates for Mr. Goebel and those working under him are as follows:

[TABLE OMITTED]

b. Kenneth Chesebro

Mr. Chesebro's practice consists primarily of

constitutional and appellate litigation. Mr. Chesebro has been practicing for approximately six to twelve years over the course of his involvement in this case. Although Mr. Chesebro asserts that there are currently no attorneys practicing in the San Diego area "who have a level of skill, experience, and reputation comparable to [his] own," (Amended Chesebro Declaration at 10), the Court disagreed. In support of his request, Mr. Chesebro included declarations from attorneys practicing in San Francisco and Los Angeles. The Supreme Court has held that reasonable fees under 42 U.S.C. § 1988 "are to be calculated according to the prevailing market rates in the relevant community," taking into account the type of practice, the experience of the attorney, and the community in which the attorney practices. *Blum v. Stenson*, 465 U.S. at 895 n.ll.

The Court was not persuaded by Mr. Chesebro's assertion that no attorneys currently practicing in the San Diego area are comparable to him in terms of reputation and experience. For instance, the County submitted the declaration of Robert Longstreth, a San Diego attorney who graduated from Yale Law School, clerked for a district court judge, and worked as a civil trial attorney at the United States Department of Justice in Washington, D.C. *See County's Notice of Lodgment in Support of Opposition to Plaintiff's Motion for Attorneys' Fees*, Exh. C. Mr. Longstreth was lead counsel for the United States in the complex, multidistrict *Agent Orange* litigation. *See id.* at 2. He also worked in the Office of Independent Counsel on the Iran-Contra matter. *See id.* at 3. Certainly, this is an attorney with a comparable, national practice and experience handling complex litigation; this attorney billed $225 per hour in 1996.

In the original motion for attorneys' fees. the County submitted a declaration and order in a case before Judge Miller in this district, in which a solo practitioner with eight years of experience in civil rights litigation was awarded a rate of $150 per hour in 1997. *See Notice of Lodgement in Support of Opposition to Plaintiff's Motion for*

*Attorneys' Fees*, Exh. D. The Court notes that Mr. Chesebro had only been out of law school for six years when he began working on this case in 1992. Thus, for the time during Phase One that Mr. Chesebro worked on this case, from 1992 to 1995 (when Mr. Chesebro was between six and nine years out of law school), the Court awarded Mr. Chesebro a rate of $150 per hour.

In support of his hourly fee request in the original motion for attorneys fees, Mr. Chesebro submitted declarations by attorneys who have been practicing for a significantly longer period of time than he has. For example, Mr. Chesebro provided as evidence a declaration by Guylyn R. Cummins, a constitutional law expert who has been practicing for fifteen years, in which Ms. Cummins states that she billed her clients at $250 per hour in 1997. In addition, the declaration states that Marcelle Mihaila, an appellate specialist who has also been practicing for substantially longer than Mr. Chesebro, billed at $300 per hour. The Court found that it would be excessive to allow Mr. Chesebro to recover the same rate as a lawyer who has been practicing for substantially longer than he has. Accordingly, the Court found that a reasonable hourly rate for Mr. Chesebro during Phase Two is $200 per hour.

In support of the motion for reconsideration, Mr. Chesebro has submitted declarations asserting that his appellate practice is nationwide in scope and therefore the prevailing market rates in San Diego should not apply to his fee request. *See Chesebro Reconsideration Declaration*, Exh. C, E. Even if the Court finds that the relevant market is the whole Ninth Circuit, this market includes Alaska, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. With regard to reasonable fees for Ninth Circuit appellate work performed by Mr. Chesebro in this case, the Court notes that the majority of appellate constitutional litigation in the Ninth Circuit is done by appointed appellate lawyers at rates set by the

Criminal Justice Act ranging from $50 to $75 per hour.[4]

Mr. Chesebro requested recovery for 194 hours of work performed during Phase One of this case, when Mr. Chesebro appealed this Court's summary judgment determination. The Court has permitted him to recover for 175 hours at $150 per hour for Phase One. Mr. Chesebro requested recovery for 117 hours of work performed during Phase Two of this case, when Mr. Chesebro appealed the outcome of a four-day trial in this Court. The Court has permitted Mr. Chesebro to recover for 105 hours at $200 per hour for Phase Two. Mr. Chesebro requests recovery for 106 hours of work performed during Phase Three of the case, which lasted less than one year and only covered the one-day trial to determine the market value of Mr. Schneider's vehicles. The Court notes that the length of time plaintiffs counsel have spent litigating their motion for attorneys' fees is substantially longer than the duration of Phase Three of the case, which focused on calculating the damages awarded to their client. The Court permitted Mr. Chesebro to recover 64 hours at $300 per hour for Phase Three, when no appeal was brought and the one-day trial in this Court dealt only with the market value of buses. The Court also notes that, pursuant to Ninth Circuit precedent, an attorneys' fee award for appellate work is often less than the award for trial work.

> "[W]e believe that in assessing 'a reasonable attorney's fees' for appellate services, a court must keep in mind that the appeal is not a

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[4] In the Northern, Southern. and Central California Districts. in Alaska and Hawaii. and in the Western District of Washington, the hourly rate for lawyers appointed pursuant to the Criminal Justice Act ("CJA ") is $75 per hour. In the Eastern District of California and in Arizona, CJA lawyers are paid $50 per hour for work performed out of court and $70 per hour for work performed in court in Oregon and Nevada, CJA lawyers receive $65 per hour for work performed out of court and $70 per hour for work in court.

separate lawsuit, but rather a continuation of a lawsuit which has progressed considerably by the time counsel commences work on the appeal. Accordingly, the amount allowed for attorneys' services on appeal should generally be less than that awarded for services at the trial of the same case." *Perkins v. Standard Oil* Co., 474 F.2d 549, 553 (9th Cir. 1973); see also *Suzuki v. Yuen*, 678 F.2d 761, 763 (9th Cir. 1982).

The record in this case consists of an appeal of a summary judgment, an appeal of a four-day trial, and a one-day trial. Compared to other cases, this is not a lengthy record, even though the case has been pending for a number of years. The Court finds that the number of hours for which it permitted recovery by Mr. Chesebro and the hourly rates it set for Mr. Chesebro are reasonable.

In the motion for reconsideration, Mr. Chesebro urges the Court to award hourly rates similar to those he received in settlement of Meilicke v. County of Los Angeles, 1991 Cal. App. LEXIS 74 (June 23, 1991), *rev. denied, op. withdrawn by order of ct*, 1991 Cal. LEXIS 4628, *cert. denied*, 502 U.S. 1099 (1992). The County strongly opposes Mr. Chesebro's position and points out that the attorneys' fees paid in this case were the product of a settlement agreement between the two parties, and were not found by a court to have been reasonable. The County also informs the Court that there were two *Meilicke* cases, one filed at the state level and one filed at the federal level, both of which went up on appeal. In addition, the state court lawsuit resulted in an award of $14.8 million dollars for the plaintiff, considerably more than the award to plaintiff this case. In determining reasonable attorneys' fees for Mr. Chesebro, the Court has taken into consideration the award in the *Meilicke* case and has given it the weight that the Court finds is appropriate under the totality of the circumstances.

Accordingly, taking into account the entirety of the *Kerr* factors, the declarations presented by both parties, as well as the nature of the work done and the experience of the attorney in question, the Court declines to adjust the hourly rates it has awarded to Mr. Chesebro:

**Phase 1: $150 per hour**
**Phase 2: $200 per hour**
**Phase 3: $300 per hour**

Mr. Chesebro also submitted hours billed by four

contract attorneys. None of the contract attorneys were out of law school for more than nine years when they worked on this case for Mr. Chesebro. One of the contract workers had graduated from law school less than one year before assisting Mr. Chesebro on this case. The County strongly opposed Mr. Chesebro's request to recover payment for work performed by these contract lawyers. *See County's Opposition to Chesebro Motion for Reconsideration* at 12 -14. These contract workers hired by Mr. Chesebro on a case-by-case basis are not his associates. They do not receive a full package of employee benefits such as retirement plans, office space, resources, or other benefits. Mr. Chesebro does not pay any overhead costs for them. In his written fee agreement of December, 1998 with Mr. Schneider, Mr. Chesebro states that all sums payable for services provided by individuals working under him are payable directly to him. *See Plaintiff's April 5, 1999 Notice of Lodgement*, Exh. 2 at 3. The Court noted that Mr. Chesebro has not submitted any documentation of his compensation arrangements with any of the contract workers, law students, or paralegals he hired to work on this case. Mr. Chesebro seeks to recover more than the amount he paid these individuals even though there are few, if any, of the indicia that would justify Mr. Chesebro making a profit on their work at the expense of the County. The County strenuously objects to Mr. Chesebro's "charging between two and three times as much for independent contractors as their actual compensation," *County's August 3, 1999 Letter to the Court.*

The Court has reviewed the arguments made by Mr. Chesebro and the evidence he has submitted in the motion for reconsideration and declines to adjust the award of $75 per hour for work done by independent contractors in Phase One (from 1990 to 1995) and $100 per hour for work done in Phase Two (from 1995 to 1998). To set a reasonable billing rate, the court must consider "the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. at 895 n.ll. The Court finds that the hourly rate paid to an independent

contractor is probative evidence of the fair market value of the services. The individuals who worked for Mr. Chesebro are independent contractors, and if Mr. Chesebro was not paying the market rate, they could have found work elsewhere. The Court found that Mr. Chesebro did not demonstrate why he should make a profit off of the contract workers he hired or why the market rate of their services is not what he paid them. Nevertheless, the Court allowed a recovery to Mr. Chesebro of more than what he paid the contract workers. Accordingly, the Court set the reasonable hourly rate for Mr. Chesebro's contract workers as follows:

**Phase 1: $75 per hour**
**Phase 2: $100 per hour**

In the motion for reconsideration, Mr. Chesebro seeks to recover hourly rates which he claims are the market rates for the work performed by the contract workers. The Court notes that, according to Mr. Chesebro's account and a declaration from Mr. Hartley, a contract lawyer, Mr. Chesebro paid this lawyer a combination $25 per hour rate plus contingency for 233 hours of work done in 1995 and then paid him solely on a contingency basis for 66 hours of work done in 1996. *See Hartley Declaration* at 5-6. There is no contemporaneous written documentation of this billing arrangement, nor any written approval of the change by the client, Mr. Schneider. As pointed out during oral argument, this change in fee structure, done without notice to the client, leads to ethical problems. "[B]efore entering into a new fee agreement, or changing an existing fee agreement, the attorney must make a full and complete disclosure to the client of all relevant factors relating to the proposed fee agreement." *See Legal Ethics Committee, Formal Opinion* 1997-1.

After considering the totality of the circumstances, the Court concludes that its award for Mr. Hartley's work was reasonable. The Court awarded Mr. Hartley $75 per

hour for work performed through September of 1995, for which Mr. Hartley received payment of $25 per hour. The Court awarded Mr. Hartley $100 per hour for work performed after September of 1995 and during 1996. The Court declines to reconsider this award.

The Court has awarded recovery of 431 of the 469 hours Mr. Chesebro requested for the four contract lawyers he hired. The Court notes that Mr. Chesebro, who asserts that he is an expert on appellate and constitutional issues, hired these four contract lawyers to do research and draft briefing in this case, which involved the appeals of a summary judgment and a four-day trial. The County had strenuously objected to the Court permitting any award at all for the work done by the contract lawyers, as it resulted in substantial duplication of effort. In addition, Mr. Schneider did not consent in writing before Mr. Chesebro hired these individuals. *County's Opposition to Chesebro Motion for Attomeys' Fees* at 11 ("[t]he foregoing hours claimed by Mr. Chesebro for outside counsel and paraprofessionals should be denied, Defendants have seen no evidence indicating that Schneider retained their services").

In its opposition to the motion for reconsideration, the County points out that Mr. Chesebro has not submitted any fee agreement with Mr. Schneider justifying an award of more than $1,000, *See County's Opposition to Motion for Reconsideration* at 18-19. The two types of fee arrangements recognized by California law are (1) contingency fee pursuant to Business and Professions Code §6147 and (2) fees which may exceed $1 ,000 under Business and Professions Code §6148. The text of §614 7 that was in effect at the time Mr. Chesebro began working on this case states that the attorney must enter into a written agreement "at the time the contract [for representation] is entered into...signed by both the attorney and the plaintiff," which includes "(1) a statement of the contingency fee rate which the client and attorney have agreed upon." CAL BUS. & PROF.

CODE §6147(a).[5] Under the provisions of §6148 in effect when Mr. Chesebro began work on the case, if fees are expected to exceed $1,000, the attorney and client must enter into a written agreement, signed by the attorney and client, which sets out "any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case." CAL. Bus. & PROF. CODE §6148(a)(1).[6]

The County has pointed out that Mr. Chesebro requested recovery for time he spent on Mr. Schneider's case starting in 1991. He requested recovery for time spent by contract workers on Mr. Schneider's case starting in 1993. However, there is no written fee agreement, signed by Mr. Chesebro and Mr. Schneider, until December or 1998. The County points out that in a case where the opposing party is required to pay attorneys' fees, the lack of a specific fee agreement is especially problematic due to the potential for a double standard between payment requested from a client and payment requested from the opposing party. *See County's Opposition to Motion for Reconsideration* at 19. The Court has carefully reviewed the arguments and supporting documents presented by Mr. Chesebro and the County and the Court declines to depart from its original determination of the hourly rates at which it has permitted recovery for the work performed by the

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[5] As of January 1, 2000, the text of §6147 is slightly different and refers to "client" instead of "plaintiff." See Stats.1994, c. 479 (A.B.3219), §3. operative January 1, 1997; *see also* Stats, 1996, c.1104 (A.B.2787), §9, operative January 1, 2000.

[6] As of January 1,2000, the provisions of §6148 are reordered §6148(a)(4), requiring that the retainer agreement be filed with the State Bar, is now deleted, *See* Stats, 1994, c, 479 (A.B.3219),§5, operative January 1,1997: see also Stats..1996. c. 1104 (A.B.2787), §11, operative January 1, 2000.

contract workers.

The Court permitted recovery by Mr. Chesebro of 36 hours billed by two paralegals working for him on this matter. Mr. Chesebro paid the paralegals $30 per hour for their work on this case and sought to recover a variable rate of between $30 and $65 per hour. The County strongly objected to Mr. Chesebro recovering anything for the work done by these paralegals. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 11 ("[t]he foregoing hours claimed by Mr. Chesebro for outside counsel and paraprofessionals should be denied,") The two paralegals hired by Mr. Chesebro, one of whom is Donald Chesebro, are not employees of Mr. Chesebro. Mr. Chesebro had no costs, such as employee benefits or office maintenance or facilities in conjunction with his hiring the paralegals. The paralegals did not receive any of the employee benefits that are provided to paralegals who work for a law firm and justify the employer's billing their work to clients at a higher rate. As independent contractors, the market rate for their work is demonstrated by Mr. Chesebro's payment to them. If Mr. Chesebro paid them less than the market rate, then they would have worked elsewhere. Therefore, the amount Mr. Chesebro paid the paralegals is the market rate for their work, In the case of paralegal work, to which the *Kerr* factors such as (2) difficulty of the legal questions involved, (4) preclusion of other employment due to acceptance of the case, and (9) experience and reputation of the attorney, do not easily apply, the market rate is the best indicator of what is a reasonable fee. *See Kerr*, 526 F,2d at 70; *see also Blum v. Stenson*, 465 U.S. at 895 n.ll. Therefore, the Court found that a reasonable fee for the paralegals' work is the $30 per hour that Mr. Chesebro paid them. The Court declines to reconsider this determination.

Mr. Chesebro hired two law students to work on this case during Phase One, in 1993. He sought to recover $85 per hour for their work. The County strongly opposed any attorneys' fee award for the work performed by law students, much less recovery at the rate of $85

per hour. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 11, Under the totality of the circumstances, including such *Kerr* factors as (3) the skill required to perform the legal service properly, (5) the customary fee, (8) the amount involved and the results obtained, and (11) the nature and length of the professional relationship with the client, the Court found a recovery of $85 per hour for law students excessive and unreasonable. See *Kerr*, 526 F .2d at 70. The law students worked on the briefing in the first appeal, most of which focused on legal arguments upon which Mr. Schneider never prevailed. Mr. Chesebro did not demonstrate that the law students had any extraordinary skills or a relationship with the client. Nor did Mr. Chesebro show that the customary fee for law students is $85 per hour. Mr. Chesebro's own payment records reflect that he paid one law student working for him $20 per hour and the other $40 per hour. Mr. Chesebro paid no overhead costs in conjunction with hiring the law students, and they were not permanent employees. The rate at which Mr. Chesebro paid them is probative of the market rate. Therefore, the Court found that the amount Mr. Chesebro paid the law students is an appropriate amount for him to recover from the County. Accordingly, the Court allowed recovery of billed law student time at $20 or $40 per hour, as they were paid.

In the motion for reconsideration, Mr. Chesebro requests recovery for the hours spent by law students at the rate of $85 per hour. Mr. Chesebro argues that his "cost of services" is irrelevant to his fee petition and that the Court's consideration of how much Mr. Chesebro paid those working under him is *sua sponte*. The Court disagrees with both statements. First, under Hensley, the district court may award reasonable attorneys fees and has discretion to determine whether the award is reasonable. 461 U.S. at 429. This Court finds that permitting Mr. Chesebro to recover up to four times as much as he paid law students constitutes an unreasonable award of attomeys' fees. Second, the Court's consideration of what Mr. Chesebro paid the

attorneys, paralegals, and law students working under him is not sua sponte. In August of 1999, the County strongly opposed paying Mr. Chesebro substantially more than he paid those working under him because this would yield "profit to Mr. Chesebro for which no actual work was performed by him," *County's August 3, 1999 Letter to the Court.* Accordingly, the Court's request that Mr. Chesebro inform the Court of the amount he paid contract attorneys, paralegals, and law students, and the Court's consideration of this information, were not *sua sponte.*

In its Order awarding attorneys' fees and expenses, the Court set the following reasonable hourly rates for Mr. Chesebro and individuals working with him:

[TABLE OMITTED]

In its Order, the Court noted that, given Mr. Chesebro's primary role in this case as appellate lawyer, and Mr. Goebel's skill and experience as a trial lawyer, a total award of 882 hours for Mr. Chesebro is a very substantial recovery. The Court also noted that it allowed recovery for a large number of hours for law students and contract lawyers in Phase One. Accordingly, Mr. Chesebro's Phase One recovery is 610 hours for the appeal of a single summary judgment motion, while his Phase Two recovery is 208 hours for the appeal ora four-day jury trial, Given the Court's award of a large number of hours, the Court found that the hourly rates it set for work done by Mr. Chesebro and those working under him are reasonable.

After a careful review of the submissions by Mr. Chesebro and the County, and a consideration of the totality of the circumstances and the *Kerr* factors, the Court declines to adjust the hourly rates it awarded for Mr. Chesebro and the contract workers, law students, and paralegals he hired.

3. Lodestar Figure

Plaintiff requested a "lodestar" multiplier to account for the delay in payment of attorney's fees and costs, based on an interest rate of 10%. Plaintiff relied on *Missouri v. Jenkins*, 491 U.S., 274, 281-83 (1989) as authority to support his contention for an upward adjustment. However, the Court in Missouri stated only that such an enhancement, "where appropriate," constitutes part of a reasonable attorney's fee. *Id.* at 282. It remains in the court's discretion to determine what type of enhancement is appropriate, as the Supreme Court has stated: "We reemphasize that the district court has discretion in determining the amount of a fee award," *Hensley*, 461 U.S. at 437. The County has strenuously objected to plaintiff's request for a multiplier to increase the overall amount of attorney's fees and costs. The Court agreed that such a multiplier would yield an excessive award. Accordingly, after fully considering the law and all evidence provided to the Court by the parties, the Court set the following lodestar figures:

[TABLE OMITTED]

B. Reduction for Limited Success

The Supreme Court has held that it is appropriate and necessary for the district court to make adjustments in awards to take into account a plaintiffs overall success. *See Hensley*, 461 U.S. 434, 35. ft is well within the district court's discretion to make such an adjustment. *See Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895, 902 (9th cir. 1995). "[T]he product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's [unsuccessful] claims were interrelated, non-frivolous, and raised in good faith." *Hensley*, 461 U.S. at 436.

The County urged the Court to decrease the plaintiff's award of attorney's fees for limited success.

*See County's Opposition to Goebel Motion for Attorneys' Fees* at 2-5; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 2-5. The County presented a variety of reasons for such a reduction. Mr. Schneider originally sued ten individual defendants, against whom he did not prevail. Although plaintiff spent substantial time during the first phase of the case pursuing a Fourth Amendment claim for search and seizure violations; summary judgment was granted for defendants on this claim, and upheld on appeal to the Ninth Circuit. Plaintiff also originally demanded punitive damages and damages for emotional distress, lost income and profits, Plaintiff did not recover damages for any of those claims. Plaintiff brought claims of fraud and statutory violations against defendants, and did not succeed on those claims, either. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 3-4; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 3-4.

Although plaintiff was successful on his takings and procedural due process claims, in light of his unsuccessful pursuit of various other claims the Court found it appropriate and reasonable to decrease the attorney's fee award, in Phase One only, by 25%. The Court therefore awarded plaintiff 75% of the lodestar in Phase One (from December 13, 1990 through September 22, 1995) as a reasonable attorney's fee.

In the motion for reconsideration, Mr. Goebel requests that the Court eliminate the lodestar reduction for limited success, or in the alternative, limit the reduction to an earlier time frame. The Court notes that the Ninth Circuit opinion in the first appeal was not issued until November 7, 1994. Until that time. Mr. Chesebro was involved in briefing the appeal, which included the Fourth Amendment claim. The Ninth Circuit has held that "[ w ]hen a party meets with partial success on appeal, we have deemed it proper to award fees only for those claims successfully defended on the merits." *Larez v. City of Los Angeles*, 946 F.2d 630,649 (9th Cir, 1991).

In determining the lodestar reduction, the Court

notes that the individual defendants were not dismissed from the action until May 25, 1995. Mr. Schneider pursued damages for lost income and profits up until the first trial in 1995. He pursued claims against defendant Reybro for fraud, statutory violations, and punitive damages up to and during the first trial. In addition, part of the 1995 trial addressed damages for emotional distress. Accordingly, the Court finds that Mr. Goebel and Mr. Chesebro spent a substantial amount of time during Phase One on claims that were later dropped or rejected. The Court declines to adjust the 25% lodestar reduction in Phase One.

[TABLE OMITTED]

C. Interest

Plaintiff requested a multiplier of 10% to account for delay in payment under *Missouri v. Jenkins*, 491 U.S. at 281. The Supreme Court in Missouri noted that an attorney's fees award may be adjusted for delay in payment. *See Missouri*, 491 U.S. 274,282, citing *Pennsylvania v. Delaware Valley: Citizens' Council*, 483 U.S. 711 (1987). However, the Court also specifically noted that a district court may compensate for delayed payment either through an award of interest or by adjusting the fee rate. *See id.*

Plaintiff's basis for a 10% interest rate on delayed payments is a declaration of an attorney in a large San Francisco law firm, Howard, Rice, Nemerovski, Canady, Falk & Rabin. However, the Court distinguishes the cases handled by Howard, Rice from this case, and also notes that the Court already accounted for delay in payment by scaling the fee rate over time, to reflect the rising market rates. Nevertheless, the Court found that it is appropriate to award interest for the substantial delay in payment for the first years of the case. Therefore, the Court awarded interest on the Phase One lodestar, which covers the years 1991 to 1995. The Court found that an appropriate rate of interest is the post-judgment

rate of 4.545%.

In the motion for reconsideration, plaintiffs counsel argue that they are entitled to 10% annual interest to compensate them for delay in payment and claim that the Court, *sua sponte*, rejected their proposed interest rate. Plaintiffs counsel misconstrue the County's position by alleging that the Court raised this objection *sua sponte*. In its opposition to the original motion for attorneys' fees, filed in May, 1999, the County vigorously opposed the request for an interest award to compensate for delay in payment. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 21-23; *County's Opposition to Chesebro Motion for Attorneys' Fees* at 19-21.

In its opposition to the motion for reconsideration, the County reiterates the point that plaintiffs counsel have not shown that there was any agreement with Mr. Schneider that interest on unpaid fees would be charged. The County argues that, if plaintiffs counsel intended to charge Mr. Schneider interest on unpaid fees, they were required by the California Unruh Act to disclose this fact in advance. See CAL. CIVIL CODE § 1801 et seq. The County also cited California law and State Bar Committee Ethics opinions which indicate that California lawyers have an ethical duty to obtain a client's informed consent and comply with applicable laws before charging interest or late charges on unpaid fees. *See: County's Opposition to Motion for Reconsideration* at 15-16. Plaintiffs counsel ignore the vigorous objections of the County made in its opposition to the original fee petition and inaccurately claim that the Court, sua sponte, objected to their request for additional interest. The Court finds that, based on a totality of the circumstances, its award of an interest rate of 4.545% on the Phase One Lodestar is reasonable. Consequently, the Court declines to adjust its award of interest.

[TABLE OMITTED]

D. Costs and Expenses

1. Louis Goebel

Mr. Goebel requested $31,268.41 in costs and expenses for the duration of the case. The County objected to $25,107.50 of Mr. Goebel's requested costs. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 21. The Court found that, pursuant to 42 U.S.C. § 1988, costs may be recoverable as part of the award to a prevailing party. *See* 42 U.S.C. §1988. Recoverable costs under § 1988 may include witness costs, photocopies, depositions. travel costs, and telephone costs. See *Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982) (photocopies, travel and telephone costs recoverable); *Alflex Corp. v. Underwriters Laboratories, Inc.*, 914 F.2d 175, 177-78 (9th Cir. 1990) (deposition costs recoverable); *Burt v. Hennessey*, 929 F.2d 457,459-50 (9th Cir. 1991) (photocopying, expert witness fee, exhibit expenses recoverable). In order to be recoverable, costs must be reasonable and necessary for effective and competent representation. *See Thornberry*, 676 F.2d. at 1244 (9th Cir. 1982); *Robins v. Scholastic Book Fairs*, 928 F.Supp. at 1035.

Mr. Goebel's itemized expenses all fall within appropriate categories for consideration as recoverable. Plaintiff had already been awarded $8,100.07 through the Clerk of Court's taxing of costs and requests the court deduct this amount from any costs and expenses awarded to Mr. Goebel by the Court. *Plaintiff's Motion for Attorneys' Fees Reply Brief* at 7. The Court therefore awarded Mr. Goebel $31,268.41 in costs and expenses, minus $8,100.07 already awarded. The motion for reconsideration does not address the Court's award of reasonable expenses to Mr. Goebel.

[TABLE OMITTED]

2. Kenneth Chesebro.

Mr. Chesebro requested $14,961.71 in costs and

expenses for the duration of this case. In its opposition papers filed in May of 1999, the County disputed $7,747.70 of those expenses. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 19. The County objected to long distance telephone charges accrued prior to Mr. Chesebro's formally agreeing to consult with Mr. Goebel on this case. The Court agreed such charges are not reasonable, and deducted $15.17 for those charges. In addition, the Court disallowed travel and hotel expenses of $997.00 for December 16, 1998 as duplicative and unnecessary. The Court awarded $13,949.54 in costs and expenses to Mr. Chesebro.

In the motion for reconsideration, Mr. Chesebro states that the Court, *sua sponte*, criticized his request to be compensated for expenses incurred in traveling to San Diego and attending the pretrial conference. Once again, this concern was not raised by the Court sua sponte. In its opposition to the original fee petition, filed in May, 1999, the County expressed its objection to the duplication of effort that resulted from both Mr. Goebel's and Mr. Chesebro's attendance at pretrial proceedings. *See County's Opposition to Chesebro Motion Attorneys' Fees* at 8-9. The County pointed out that Mr. Chesebro participated heavily in proceedings during the last phase of the case, after liability (and attorneys' fees) became certain in December of 1998.[7] The Court notes that Mr. Chesebro was hired as an appellate lawyer and that Mr. Goebel is well qualified to prepare for and argue a simple trial on the market value of vehicles. The Court permitted Mr. Chesebro to recover payment for the time he spent

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[7] The County stated that Mr. Chesebro did not attend the four-day trial in 1995 or any of the related court proceedings or depositions. However, in December of 1998 and January of 1999, Mr. Chesebro attended pretrial depositions, the pretrial conference, and the one-day trial to determine the market value of vehicles towed from Mr. Schneider's property. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 8-9.

attending the second trial and for the time he spent at depositions attended by him, Mr. Goebel, and Mr. Miller in 1999. The Court has taken into consideration Mr. Chesebro's arguments and, under the totality of the circumstances, declines to reconsider the award of costs to Mr. Chesebro.

[TABLE OMITTED]

E. Final Award

In making the final award of attorneys' fees and expenses, the Court took into careful consideration plaintiffs arguments in support of Mr. Goebel's and Mr. Chesebro's calculations of their attorneys' fees and expenses. The Court also reviewed the County's numerous objections to plaintiffs requested fees and expenses. In particular, the County pointed out that during Phase One and Phase Two of the case, Mr. Chesebro had a total of seven different individuals working under him. The County alleged that work done by the contract workers, law students, and paralegals hired by Mr. Chesebro was duplicative. The County also alleged that the number of hours for which Mr. Chesebro requested payment is disproportionate to his role in the case. The County argued that it was unnecessary for both Mr. Goebel and Mr. Chesebro to attend the depositions, the pretrial conference and the second trial to determine damages during Phase Three of the case. The County asserted that this was a simple trial on the issue of the market value of the vehicles removed from plaintiffs lot, but it occurred after a finding of liability, and therefore grounds for recovery of attorney's fees, was established. The Court agreed.

After considering the arguments made by plaintiffs counsel and the County, the Court finds that the final hourly rates it has awarded Mr. Goebel and Mr. Chesebro are reasonable in light of the number of hours awarded by the Court. The County had objected both to Mr. Goebel's hourly rate and to Mr. Goebel's request to

recover for 1,232.1 hours of work done by him and those working under him. *See County's Opposition to Goebel Motion for Attorneys' Fees* at 6, 9-11. Despite these objections, the Court allowed recovery for 1,209 hours. Given the Court's acceptance of the vast majority of hours submitted by Mr. Goebel, the Court finds that the hourly rates it awarded to Mr. Goebel and individuals working with him are reasonable. If there was a further increase in the hourly rate awarded to Mr. Goebel, there would probably have to be a corresponding decrease in the number of hours for which the Court permits recovery.

With regard to Mr. Chesebro's fee request, the County objected to recovery for any of the hours spent by contract workers and law students, since there was no written agreement from Mr. Schneider authorizing Mr. Chesebro to hire these individuals. *See County's Opposition to Chesebro Motion for Attorneys' Fees* at 10-11. The County also objected to Mr. Chesebro's hourly rate and the number of hours submitted by Mr. Chesebro as excessive. *See id.* at 6,9-10. Nevertheless, the Court allowed recovery for 538 hours spent by individuals working under Mr. Chesebro, in addition to 344 hours recovered by Mr. Chesebro for his work. In light of the large number of hours awarded, the Court finds that the hourly rates it has awarded to Mr. Chesebro and the individuals he hired is reasonable. If there were an increase in the hourly rate for Mr. Chesebro, then there would probably have to be a decrease in the number of hours for which he recovered payment, in order for the total award to be reasonable.

The Court has reviewed the briefs and supporting documents in plaintiff's motion for reconsideration of the Court's Order awarding attorneys' fees and has also considered the County's arguments and supporting evidence. Based on a consideration of the totality of the circumstances and the *Kerr* factors, the Court has adjusted the hourly rates it awarded to Mr. Goebel and Mr. Paape. The Court increases Mr. Goebel's rate for Phase One to $200 per hour and increases Mr. Goebel's

rate for Phase Two to $275 per hour. The Court increases Mr. Paape's rate in Phase One to $125 per hour. The following calculation of the total attorneys' fee award reflects these adjustments in hourly rates. The Court declines to alter any other aspect of its original determination of reasonable attorneys' fees and expenses, Additionally, the Court declines to award any fees for bringing the motion for attorneys fees and expenses or the motion for reconsideration.

After fully considering the papers filed, the law, and the totality of the circumstances, the Court makes a final award to plaintiff Schneider of$163,259.48 in attorney's fees and $31,268.41 in costs for Louis Goebel and $97,140.37 in attorney's fees and $13,949.54 in costs for Kenneth Chesebro, for a total award of $305,617.30. The jury award in this case was $67,795.50, with a prejudgment interest award of $34,145.54, for a total award of $101,941.04, The Court is extremely familiar with this case, has given thoughtful and deliberate consideration to the arguments of all parties, and finds in the totality of the circumstances that a total award of $305,617.30 is fair and reasonable.

[TABLE OMITTED]

IT IS SO ORDERED.

DATED: 3/16/00

/s/ Marilyn L. Huff
MARILYN L.HUFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

**FILED**
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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| LOUIS SCHNEIDER,<br><br>Plaintiff,<br><br>vs.<br><br>COUNTY OF SAN DIEGO,<br><br>Defendant. | CASE NO. 90-CV-1738 H<br><br>**Order Denying Plaintiff's Motion for Reconsideration of Court's March 16, 2000 Order (Docket # 338) and Denying Plaintiff's Request for an Additional Award of Attorneys' Fees and Expenses (Docket # 334)** |

On March 31, 1999, Mr. Schneider filed a motion for attorneys' fees and expenses pursuant 18 to 42 U.S.C. § 1988(b). On September 29, 1999, the Court issued an order awarding $278,984.76 in 19 attorneys' fees and expenses to plaintiff's lawyers, Mr. Goebel and Mr. Chesebro. On October 29, 1999, plaintiff filed a motion for reconsideration of the Court's September 29, 1999 order awarding attorneys' fees and expenses. Accordingly, on March 16, 2000, the Court granted in part and denied in part plaintiff's motion for reconsideration and adjusted the award of attorneys' fees and expenses to $305,617.30. On March 30, 2000, the Court entered an amended judgment in the case. On April 13, 2000, plaintiff filed a motion for an award of additional attorneys' fees and expenses. On April 17, 2000, plaintiff filed a motion for reconsideration of the Court's March 16, 2000 order granting in part and denying in part plaintiff's original motion for reconsideration.

The Court denies plaintiff's motion for reconsideration and denies plaintiffs request for an additional award of attorneys' fees and expenses. The Court notes that it issued an order on January 26, 1999, setting a hearing date for the attorneys' fee motion on April 5, 1999. After plaintiffs counsel waited until March 31, 1999 to file the motion, the Court accommodated the parties' supplemental briefing and heard oral argument. Since the January 26, 1999 order was issued, the Court has spent approximately sixteen months litigating the motions concerning reasonable attorneys' fees and expenses in this case. For the reasons stated below, the Court finds that the instant motions are untimely and constitute unwarranted additional fee litigation, as the Court has previously made a fair and reasonable fee award.

I. Motion for Reconsideration

A. The Motion is Untimely

Plaintiff brings the present motion for reconsideration pursuant to Federal Rule of Civil Procedure 54(b), which states that an "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." The judgment was entered in this case on March 30, 2000. Plaintiff filed the motion for reconsideration on April 17, 2000, over two weeks after entry of judgment in this case. Plaintiff's motion is untimely under Rule 54(b), which requires that a motion for reconsideration be filed before entry of judgment. In addition, under Federal Rule of Civil Procedure 59(e), a motion to alter or amend judgment "shall be filed no later than 10 days after entry of the judgment." Therefore, plaintiff's motion is also untimely under Rule 59(e).

A motion for reconsideration under Federal Rule of Civil Procedure 60 may be brought "within a reasonable time...not more than one year after the judgment." FED.

R. C.V. P. 60(b). However, plaintiff has not met the standard for a motion for reconsideration under Rule 60. Federal Rule of Civil Procedure 60(a) addresses "clerical mistakes," which are not at issue here. Rule 60(b) states that the court may relieve a party from a final judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied or discharged; or (6) any other reason justifying relief from the operation of the judgment. FED. R. C.V. P. 60(b). Plaintiff has not shown a valid reason justifying relief from the judgment entered on March 30, 2000 awarding $305,617.30 in attorneys' fees and expenses to plaintiff's counsel, Mr. Goebel and Mr. Chesebro.

Furthermore, the County strongly objects to plaintiff's duplicative request for "reconsideration of a previous motion for reconsideration." County 's Opposition to Motion for Reconsideration of March 16, 2000 Order at 2. The Court agrees that this motion constitutes unnecessary additional fee litigation. On September 29, 1999, after careful consideration of the parties' submissions, the facts, and the law, the Court made an award of reasonable fees and expenses. Plaintiff requested reconsideration of the Court's order and presented new evidence to the Court which the Court considered, although the plaintiff could have submitted the evidence in the original fee petition. Accordingly, after another painstaking review of all the evidence submitted by the parties, the circumstances of the case, and the applicable law, the Court granted reconsideration as to the hourly fee awarded to Mr. Goebel and his associate, Mr. Paape. The Court denied reconsideration as to all other aspects of plaintiff's request for reconsideration.

In this second motion for reconsideration, plaintiff criticizes the Court's March 16, 2000 order on reconsideration and requests the Court to reconsider this order. As the County points out, plaintiff has not

provided any legal support for this type of request for "reconsideration-of-reconsideration." *See County's Opposition to Motion for Reconsideration* of March 16, 2000 Order at 1. Moreover, the motion was not filed within ten days after entry of judgment. Accordingly, the Court denies plaintiff's motion for reconsideration of the Court's March 16, 2000 order as untimely and unwarranted.[1]

B. The Motion for Reconsideration Fails on the Merit

Even if plaintiff's instant motion for reconsideration were timely, the Court would deny it on the merits because, as the County states in its opposition, "a motion to reconsider is not at the disposal of parties who want to 'rehash' old arguments that previously were made and rejected . . . or to raise new arguments or evidence that could have been previously offered." *Securities and Exchange Com'n v. Lipson*, 46 F .Supp.2d 758, 765 (N.D. Ill. 1999), cited by plaintiff as support for plaintiff's motion for reconsideration, *see Memorandum in Support of Motion for Reconsideration of March 16, 2000 Order* at 2. In this second motion for reconsideration, plaintiff addresses issues which were already considered by the Court in its March 16, 2000 order. Plaintiff's

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[1] Plaintiff states that the motion for reconsideration is "made pursuant to Fed. R. Civ. P. 54(b) and/or CivLR 7.1(i)." *Memorandum in Support of Motion for Reconsideration of March 16, 2000 Order* at 1. However, plaintiff then states that the motion "seeks no substantive relief, 'in whole or in part,' CivLR 7.I(i)(1 )," *Id.* In addition, plaintiff asserts without support that the motion "is not subject to the requirement of CivLR 7.I(i)" and need not show "what new or different facts and circumstances" exist that did not exist before. Id. at 2. The Court denies the motion on the grounds that it is untimely under Federal Rule of Civil Procedure 54(b), unjustified on the merits, and without meritorious new facts or new law.

second motion for reconsideration is duplicative and inappropriate.

For example, the County had argued that Mr. Chesebro should not be awarded any attorney's fees because, for more than six years after Mr. Chesebro began working on plaintiff's case, Mr. Chesebro did not have a written fee agreement with plaintiff. In the alternative, the County argued that Mr. Chesebro should be awarded no more than $1,000, the amount authorized by statute that an attorney may collect without a written fee agreement. *See County's Opposition to October 29, 1999 Motion for Reconsideration* at 18-19; California Business and Professions Code §6148 (if fees are expected to exceed $1,000, the attorney and client must enter into a written agreement, signed by the attorney and client). Mr. Chesebro entered into a written fee agreement with Mr. Schneider less than four months before plaintiff submitted to the Court a request for an award of attorneys' fees and expenses. Nevertheless, the Court rejected the County's forfeiture argument and made an award of reasonable attorneys' fees based on a lodestar calculation. *See Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992).

Despite the Court's rejection of the County's argument that Mr. Chesebro has forfeited a recovery of reasonable attorneys' fees and expenses, Mr. Chesebro has submitted a declaration by Ellen R. Peck, stating that Mr. Chesebro's questionable compliance with California rules of professional responsibility does not result in forfeiture of a reasonable award of attomeys' fees. Ms. Peck states "even assuming that there could be some sort of impropriety associated with either delayed compliance or no compliance with Section 6148, under applicable precedent it would not affect in any way Mr. Schneider's entitlement to recover the reasonable value of his attorneys' services." Peck Declaration at 7. The Court finds, and Ms. Peck does not refute, that Mr. Chesebro failed to obtain written consent from Mr. Schneider at the outset of his work on the case in 1992 and did so only in December 1998, after a finding of

liability. Ms. Peck does not state in her declaration that this is good practice; in fact her publications in the area of professional responsibility indicate that Mr. Chesebro's conduct in this regard was not exemplary.[2] Nevertheless, the Court rejected the County's forfeiture argument and awarded reasonable fees under the lodestar standard. *See Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992).

Under 42 U .S.C. § 1988(b), Mr. Chesebro is entitled to "reasonable" attorneys' fees,. It is within the Court's

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[2] *See, e.g.*, Paul W. Vapnek, Mark L. Tuft, Ellen R. Peck, Justice Howard B. Wiener (Ret.), The Rutter Group California Practice Guide to Professional Responsibility (1997) at ¶5-77. If the purpose of professional responsibility rules is to protect the client's interests, then permitting the lawyer to obtain an untimely written fee agreement just before making a request for fees does not accomplish the goal of providing full disclosure to the client at the start of the representation. *See* Ellen Peck & Steven A. Lewis, *Earning and Keeping Your Fees: Fee Agreements are the Second Most Important Document of Any Legal Practice*, California Bar Journal, August 1998. Plaintiff seeks to recover for the belated Peck declaration as part of his attorneys' expenses. The Court, in its discretion and given the circumstances of the case, declines to award any amount for this declaration.

Additionally, plaintiff failed to have independent counsel consult with Mr. Schneider prior to potentially exposing him to additional costs for which he would not be liable without a written fee agreement. It may be in Mr. Schneider's interest, for example, to settle or not pursue attorneys' fees and additional costs, but it may be in Mr. Chesebro's interest to pursue the attorneys' fees motion. In these circumstances, it is preferable to have a written fee agreement at the outset of the case or to have independent counsel advise Mr. Schneider if he is exposed to additional costs that are incurred simply to protect Mr. Chesebro's interest in an attorneys' fee recovery. *See* The Rutter Group California Practice Guide to Professional Responsibility (1997) at ¶5-5 ("In certain instances, renegotiating a fee agreement with an existing client may give rise to a conflict of interest").

discretion, taking into consideration the totality of the circumstances, to determ1ine what fees are reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424,437 (1983). The Court has reviewed all the papers submitted by plaintiff in connection with this attorneys' fee Litigation, has considered plaintiffs arguments and the County's opposition briefing, and finds that its award of attorneys' fees and expenses is fair and reasonable. Accordingly, the Court denies plaintiffs motion for reconsideration.

II. Motion for an Award of Additional Attorneys' Fees and Expenses

Plaintiff requests an additional award of attorneys' fees and expenses incurred after March 20, 1999 for (a) work performed on post-trial motions and (b) work performed in litigating attorneys' fees and expenses. The Court notes that March 20, 1999 is a date chosen by plaintiff, not the Court. The Court's September 29, 1999 order states that the Court's award of attorneys' fees and expenses "covers all time since remand to this Court." September 29, 1999 Order at 5. The Court's March 16, 2000 order specifies that the Court's award of attorneys' fees and expenses "covers time since remand to this Court up to the conclusion of the case, on May 30, 1999." March 6, 2000 Order at 10.

A. Request for Fee Incurred in Post-trial Motions

Plaintiff asserts that his counsel incurred attorneys' fees and expenses after March 20. 1999 in relation to (i) plaintiff's motion for nominal damages, filed February 1, 1999; (ii) plaintiffs motion for a new trial on the market value of vehicles, filed February 9, 1999; and (iii) plaintiffs motion to alter or amend judgment to add prejudgment interest, filed February 9, 1999. Plaintiff filed all the papers related to these post-trial motions before March 20, 1999. The only hearing that occurred in relation to the post-trial motions after March 20, 1999 was a hearing on April 5, 1999, well before the Court's

award of attorneys' fees.

The Court made its initial award of attorneys' fees on September 29, 1999. In making its determination of an award of reasonable attorneys' fees, the Court reviewed its records of all the proceedings that occurred in this case and took into consideration the time spent by plaintiffs attorneys on plaintiffs post-trial motions and the limited success plaintiff had on these motions. *See Order of June 25, 1999* (the Court awarded prejudgment interest of $34,145.54 (plaintiff had requested $64,931.071 in prejudgment interest), the Court denied plaintiffs motion for a new trial, and the Court denied plaintiff's motion for nominal damages). In making its determination of a reasonable attorneys' fee for the post-trial motions, the Court took into consideration that both Mr. Goebel and Mr. Chesebro appeared at the April 5, 1999 hearing on plaintiff's post-trial motions. The Court incorporates the County's consistent objection to both Mr. Goebel's and Mr. Chesebro's participation in relatively straightforward proceedings that occurred in the later phases of the case, after liability and attorneys' fees were established. *See County's Opposition to Request for Additional Award of Fees* at 22.

The Supreme Court has stated that fee-shifting statutes favor "treating a case as an inclusive whole, rather than as atomized line-items." *Commissioner, INS v. Jean*, 496 U.S. 154, 162 (1990). Plaintiffs request for additional attorneys' fees for post-trial motions separates the preparation for and attendance at the hearing from the whole of their work on the case and conflicts with the Supreme Court's view. In addition, this request for additional fees is untimely: plaintiff already brought a motion for reconsideration in which these additional fees could have been addressed. In making its award of reasonable attorneys' fees, the Court took into consideration the totality of the circumstances and all work performed in Mr. Schneider's case on the merits.[3]

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[3] The Court has already awarded approximately $7,000 in

Accordingly, as the Court has already taken into consideration plaintiffs counsel's preparation for and attendance at the April 5, 1999 hearing, the Court declines to award additional attorneys' fees for the post-trial motions.

Plaintiff requests recovery for $28.35 in expenses in conjunction with the post-trial motions for a "FedEx to Lou Schneider" on January 13, 2000. *See Motion for Award of Additional Attorneys' Fees*, Exh. 2 at 4. The County objects to recovery of this expense. *See County's Opposition to Request for Additional Award of Fees* at 17-18 ("Defendants cannot determine whether entries are reasonable without documentation, much less whether they were necessary, considering the availability of ordinary mail, e-mail, and fax transmissions at much

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fees and expenses for plaintiff's counsel's work on the post-trial motions and $8,400 for attorneys fees for the fee motion. The Ninth Circuit has held that the district court has discretion to determine whether the same expertise that supports a high rate for the merits portion of the case justifies using the same high rate for later phases. *See Gates v. Rowland*, 39 F.3d 1439, 1451 (9th Cir. 1994). In the instant motion, plaintiff requests an additional recovery of $5,890.85 in fees and expenses for work done on the post-trial motions. The Court finds the award it has already made is fair and reasonable. In addition, a part of the post-trial litigation focused on whether plaintiff should receive $2.00 in nominal damages. Even under the "private attorney general" theory, which "allows the fee award to exceed what a reasonable individual would pay lawyers for the benefit conferred on him," the Court denies plaintiffs request for an additional several thousand dollars in fees for litigating about whether plaintiff should be awarded $2.00. *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805, 810 (9th Cir. 1994) (9th Cir. 1994) (holding the district court erred in awarding the full amount of attorneys' fees requested where "no reasonable person would" have paid lawyers the amount of money they requested to obtain the relief plaintiff ultimately received). The Court has made a fair award while considering the purpose of nominal damages in civil rights litigation.

lower cost."). In addition, the Court notes that plaintiff includes this expense as related to the post-trial motions. However, the Court issued a ruling on the post-trial motions on June 25, 1999. It is unclear why a package would have to be sent via Federal Express to Mr. Schneider over six months after the Court ruled on the post-trial motions. Accordingly, the Court denies plaintiffs request to recover an additional $28.35 in expenses relating to work done on the post-trial motions

B. Request for Fees Incurred in Litigating Reasonable Attorneys' Fees and Expenses

Plaintiff requests an additional award of "fees-on-fees," and the County strenuously objects to any such award. County's Opposition to Request for Additional Award of Fees at 1. The Court's award of attorney's fees included a reasonable amount for the attorney's fee motion. In the motion for reconsideration, the Court declined to award any additional fees for bringing the motion for attorneys' fees and expenses or the motion for reconsideration. March 16, 2000 Order at 41. Nevertheless, the Court will address plaintiffs request for an award of additional fees incurred in litigating the fee motion.

1. Legal Standard for an Award of Fees Incurred in Litigating the Fee Request

The Supreme Court has stated "that 'a request for attorney's fees under §1988 raises legal issues collateral to' and 'separate from' the decision on the merits." *Budinich v. Becton Dickinson &.Co.*, 486 U.S. 196,200 (1988), citing *White v. New Hampshire Dept. of Employment Security*, 455 7 U.S. 445,451-52 (1982). The County argues, and the Court agrees, that since attorney's fees are not "relief," there is no independent authority to award fees for obtaining them. *County's Opposition to Request for Additional Award of Fees* at 4. Rather, the Court has already awarded a reasonable fee

under the standards set by law. The Supreme Court has noted concerns "of infinite litigation over fees." *Commissioner. INS v. Jean*, 496 U.S. 154, 163 (1990). In addition, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424,437 (1983).

The County cites the leading fees-on-fees case, *Muscare v. Quinn*, 680 F.2d 42 (7th Cir. 1982) in its opposition to plaintiffs request for additional fees. *See County's Opposition to Request for Additional Award of Fees* at 4-5. In an opinion written by Judge Posner, the Seventh Circuit affirmed the district court's decision not to award any fees for the litigation of the fee petition. In Muscare, the 17 district court had awarded attorneys' fees of $25,000. The defendant appealed the award, and the Seventh Circuit reversed and required a reduction in the award. On remand, the district court awarded 19 $8,000. Plaintiff then moved in the district court for an award of fees incurred in litigating the fee petition. The district court denied the motion. The Seventh Circuit affirmed and stated "[f]rom this review of the history of the litigation it is clear that the district judge had discretion to deny the plaintiffs second fee request in its entirety. 'The exercise of discretion...gives the district judge great leeway. If the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high, the judge may refuse further compensation." *Muscare*, 680 F .2d at 54, citing *Gagne v. Maher*, 594 25 F.2d336,344(2dCir. 1979), aff'd, 448 U.S. 122(1980). In *Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895 (9th Cir. 1995), the Ninth Circuit affirmed the district court's fees-on-fees determination because "[t]he district court found that' [n]ot only are the hours claimed in litigating the fee award excessive, but counsel failed to document with any degree of accuracy productive work and unproductive churning.'" *Schwarz*, 73 F.3d at 909.

The County cited and the Court notes the following statement by the Seventh Circuit in *Muscare*:

> For rather obvious practical reasons we are loath to disturb a ruling by a district judge on a request for second-round attorneys' fees . . . . Every civil rights litigation will be like a nest of Chinese boxes. The outside box is the litigation of the civil rights issue itself. Within it is the litigation over the fees incurred in the litigation over the merits - ordinarily a lesser litigation, as our metaphor implies, though in this case the stakes in each of the two rounds of fee litigation have been greater, at least in monetary terms, than the stakes in the original civil rights litigation.

*Muscare*, 680 F .2d at 44.

2. Given the History and Circumstances of the Fee Litigation in this Case, the Court Declines to Award Fees for the Litigation of the Fee Petition

On January 26, 1999, the Court set a hearing date of April 5 , 1999 for the motion for attorneys' fees and expenses in this case. Plaintiff did not file the motion for attorneys' fees and expenses until March 31, 1999. In support of the fee petition, plaintiff submitted declarations and amended declarations from his attorneys, as well as declarations from five other attorneys. Significantly plaintiff failed to submit to the Court a court order from Judge Hyde of the San Bernardino County Superior Court awarding Mr. Goebel attorney's fees at an hourly rate that was lower than the rate he requested in the fee petition. Plaintiff instead relied solely on attorney declarations.[4] The County then

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[4] The Court notes that plaintiff did not submit Judge Hyde's order until the motion for reconsideration. after the Court had made an award of attorneys' fees for Mr. Goebel based on an hourly rate that was consistent with rates awarded by two district judges from this district, but lower than the amount

filed an opposition. Plaintiffs reply briefing included two additional declarations, three supplemental declarations, and one declaration filed in a San Diego Superior Court case.

The Court carefully reviewed all the briefing from the parties. Based on the objections by the County to plaintiffs request for fees, the Court requested additional briefing regarding Mr. Chesebro's lack of contemporaneous billing records and Mr. Chesebro's request to recover payment for work done by contract workers and law students. The Court ordered Mr. Chesebro to submit contemporaneous billing data and documentation of his payments to contract workers and law students for work performed on the case. The Court then heard telephonic oral argument on August 27, 1999. At the oral argument, the County raised concerns about several different contract workers for whom Mr. Chesebro requested recovery and Mr. Chesebro's failure to inform the Court of whether and at what rate he paid these individuals for their work. Accordingly, on September 3, 1999 the Court ordered Mr. Chesebro to submit a list of contract workers and to submit any correspondence or other documents regarding his billing arrangement with Mr. Schneider. After receipt of Mr. Chesebro's submission, the Court carefully reviewed all the papers filed, the oral arguments of the parties, the "totality of the circumstances," and the factors listed in *Kerr v. Screen Extras Guild*, 526 F .2d 67, 70 (9th Cir. 1975), and issued an award of attomeys' fees and expenses totaling $278,984.76.

The County did not appeal this award; in fact, the County asserts it made prompt payment of the Court's award on October 28, 1999. See County's Opposition to Request for Additional Award of Fees at 3.[5] Plaintiff filed

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Mr. Goebel had requested in the fee petition and lower than the amount awarded by Judge Hyde. *See Goebel Reconsideration Declaration, October 29, 1999*, Exh. B.

[5] The County asserts that it made prompt payments of the

a motion for reconsideration on October 29, 1999, The motion for reconsideration contained evidence that should have been in the original fee petition, including seven declarations, one declaration from a case in the Superior Court in San Bernardino County, and a court order from that case in which Judge Hyde awarded Mr. Goebel attorney's fees at an hourly rate that was lower than the rate Mr. Goebel had requested in his fee petition, but higher than the hourly rate the Court awarded him. The Court notes that there was no valid explanation for why this additional support was not provided in the initial fee petition. The County filed an opposition to the motion for reconsideration on December 20, 1999.

Plaintiffs reply papers in the motion for reconsideration consisted of a 33-page declaration from Steven Mayer with approximately one-hundred pages of exhibits, and two more declarations from Mr. Chesebro

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following items: costs taxed by the Clerk of Court, the damages award and prejudgment interest to Mr. Schneider, the Court's award of attorneys' fees and expenses, and postjudgment interest demanded by Mr. Schneider. &r. County's Opposition to Request for Additional Award of Fees at 3. Nevertheless. plaintiff, in the instant motion for additional attorney's fees, requested recovery for $4,000 of fees incurred in working out the "logistics of defendants' partial payments." Chesebro Declaration, April 13. 2000, Exh. 2. The County stated in its opposition that plaintiff's work on "logistics of defendant's partial payments" "represents attempts to generate disputes over the County's prompt (and perhaps even premature) payment of court-ordered sums, plus post-judgment interest." County's Opposition to Request for Additional Award of Fees at 22. After the County asserted that "plaintiff seeks almost $4,000 for doing nothing but arguing over them [the payments]" and submitted to the Court copies of letters sent by plaintiffs counsel to County counsel, plaintiff withdrew its request to recover for time spent on these "logistics." *Id.* at 20.

and Mr. Goebel.[6] The County has objected to plaintiff including additional information in a reply declaration, which deprives the County of an opportunity to respond. *See County's Opposition to Request for Additional Award of Fees* at 22. The Court agrees.

On March 16, 2000, the Court issued an order granting reconsideration as to Mr. Goebel's hourly rate and the hourly rate of his associate, Mr. Paape, in light of Judge Hyde's order, despite the fact that plaintiff failed to submit the order with the initial fee petition. The Court adjusted the total award to $305,617.30. The Court's order denied reconsideration as to all other elements ofplaintifrs motion and explicitly stated that the Court would not "award any fees for bringing the motion for attorneys' fees and expenses or the motion for reconsideration." *March 16, 2000 Order* at 41. On March 30, 2000, the judgment was entered inc1uding the amended award of attorneys' fees and expenses.

On April 13, 2000, plaintiff filed an untimely motion for an additional award of attomeys' fees. Furthermore, on April 17, 2000, plaintiff filed a second motion for reconsideration of the Court's award of attorneys' fees. The Court denies the motions for additional attorneys' fees and reconsideration as untimely and unnecessary litigation of the award of attorneys' fees.

As to the request for recovery of fees for litigating the fee petition, the Court's review of fees and expenses incurred reaffirms the Court's ruling that it will not award additional fees-on-fees in this case. Mr. Goebel and Mr. Chesebro request recovery for work done in compiling the fee petition at the rate of $300 per hour - the rate the Court awarded for plaintiffs counsel's work

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[6] The Court notes that Mr. Chesebro seeks $23,417.11 for Mr. Mayer's reply declaration for the motion for reconsideration. *See Motion for Award of Additional Attorneys' Fees*, Exh. 2 at 43. Exercising the Court's authority under the standards set by law and the Court's discretion, the Court declines to award this amount.

in litigating the merits of this case. The expertise and skill required to prepare and argue a fee petition do not justify a rate of $300 per hour. Under *Gates v. Rowland*, 39 F.3d 1439, 1451 (9th Cir. 1994), the district court has discretion to determine whether the same expertise that supports a high rate for the merits portion of the case justifies using the same high rate for the postjudgrnent phase. If the Court were to award attorneys' fees for litigating this fee petition, the Court would set a much lower hourly rate than it did for work done on the merits of the case. *See March 16. 2000 Order* at 26 (the rate awarded CJA lawyers is $75 per hour).

The Court notes that it already awarded plaintiff $8,400 for 28 hours spent in preparing the motion for attorneys fees. The Court based this award on a lodestar calculation, made after careful consideration of the totality of the circumstances. *See Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992); *Kerr v. Screen Extras Guild*, 526 F.2d 67,70 (9th Cir. 1975). The Court stated in its March 16, 2000 order on reconsideraton that it would not award any additional fees for the preparation of the fee motion. Accordingly, the Court, in the exercise of its discretion, already awarded plaintiffs counsel a reasonable award for time spent in preparing the request for attorneys' fees.

Plaintiff's counsel did not minimize the hours spent in preparing the fee petition, delegate tasks that could have been performed by associates at a lower rate, or present all documents relevant to the fee petition with the initial motion. Plaintiff requests recovery for almost 500 hours of work on the fee petition, all of which was done by Mr. Goebel and Mr. Chesebro. The Court finds the request to be unreasonable under the standards set by law. The Court notes that plaintiff frequently submitted declarations with reply papers,[7] which the

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[7] Plaintiff submitted a 33-page declaration from Steven Mayer in reply papers for the first motion for reconsideration. *See Mayer Declaration, January 18, 2000.* In this motion for an

County has consistently objected to as "plaintiffs sandbagging practice of including specific evidence in reply briefs to deprive defendants of effective rebuttal." County's Opposition to Request for Additional Award of Fees at 22. The Court agrees, and declines to reward such practices or award an unreasonable amount of fees.

Plaintiff's filings in the fee motions, stacked one on top of another, build a tower two feet tall. The County challenges Mr. Chesebro's statement that he was attempting "to eliminate pointless duplication." Chesebro Declaration. April 13. 2000 at 2. "If plaintiff's counsel truly sought to 'eliminate pointless duplication,' they would not be clustering items, giving vague descriptions, charging attorney rates for non-attorney work perfonned, and otherwise committing the same errors as in the earlier motion." *County's Opposition to Request for Additional Award of Fees* at 7. The Court agrees with the County.

The County also objects to the fact that Mr. Goebel and Mr. Chesebro performed all of the tasks related to preparation of the fee petition themselves, while Mr. Chesebro previously relied on law students and contract attorneys. The Court concludes that most of the tasks in the fee petition, such as reviewing billing records, researching local billing rates, making calls regarding declarations, proofreading and editing, and arranging for filing and serving papers, could have been performed at a lesser rate. *See County's Opposition to Request for Additional Award of Fees* at 13-17.

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additional award of fees, plaintiff's reply papers contain a 30-page declaration from Mr. Chesebro as well as another declaration from Mr. Mayer. Se.e: Chesebro Declaration, May 11,2000; Mayer Declaration, May 11, 2000. The County objected to these declarations "which go beyond the permissible scope of reply papers." County'5 Objections to Portions of Plaintiffs Reply Memorandum, May 25, 2000, at I. The Court, in the exercise of its discretion, declines to award expenses for the additional declaration from Mr. Mayer submitted with this motion for additional fees.

In *Gates v. Rowland*, the plaintiff appealed an award of attomey's fees and the Ninth Circuit affirmed the award, finding that the district court's determination was not an abuse of discretion, and citing the district court's finding that: "what is missing from this case is some reflection on recent developments in the practice of setting fees in the open market...if plaintiffs were private paying clients, one might well expect a negotiated 'litigation budget' or some other arrangement to control costs." *Gates v. Rowland*, 39 F.3d 1439, 1451 (9th Cir. 1994). The County has consistently maintained its objection that plaintiffs counsel may not recover fees from the County (ultimately, the taxpayers) that counsel would not be justified in recovering from a paying client. S.e.e County's Opposition to Request for Additional Award of Fees at 22. The Court finds that plaintiffs request for additional fees-on-fees under the circumstances of this case exceeds the bounds of reasonableness.

In making its award of attorneys' fees, the Court considered all the evidence presented by the parties. The Court notes that its award of $150 per hour for work perfonned during the first phase of the case is exactly the same as the amount awarded by two different judges in this district for work performed during the same time period. *See March 16. 2000 Order Granting in Part and Denying in Part Plaintiff's Motion for Reconsideration* at 22. [n addition. the County has presented evidence in response to plaintiffs motion for an additional award of fees that the $300 per hour rate that the Court awarded for work performed during the third phase of the case is higher than the prevailing rate. *County's Opposition to Request for Additional Award of Fees* at 6, Exh. A.

To permit an award of additional fees-on-fees in these circumstances gives parties an incentive to draw out the fee litigation. The Supreme Court has stated "no award of fees is automatic...Exorbitant, unfounded, or procedurally defective fee applications like any other improper position that may unreasonably protract proceedings are matters that the district court can

recognize and discount." *Commissioner, INS v. Jean*, 496 U.S. 154, 163 (1990). Therefore, given the history of the fee litigation, the circumstances of this case, and the applicable law, the Court, in the exercise of its discretion, declines to award additional fees or expenses incurred in the litigation of this fee petition.[8]

**Conclusion**

After careful consideration of the facts, the law, and the papers submitted by the parties, the Court DENIES plaintiffs motion for reconsideration of the Court's March 16, 2000 order and the Court DENIES plaintiffs motion for an additional award of attorneys' fees and expenses. Absent approval from the Court, there will be no further filings with the district Court in this matter other than a notice of appeal, if applicable.

IT IS SO ORDERED.

DATED: 6/27/00

/s/ Marilyn L. Huff
MARILYN L.HUFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[8] The district court has been requested to make an award of attorneys' fees on appeal. Any request for attorneys' fees for future appellate work is premature at this time.

**[ER 1842]**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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| LOUIS SCHNEIDER,<br><br>Plaintiff,<br><br>vs.<br><br>COUNTY OF SAN DIEGO,<br><br>Defendant. | No. 90-CV-1738 H (POR)<br><br>**Declaration of Steven L. Mayer in Support of Plaintiff's Motion for Award of Attorney's Fees and Expenses Incurred After March 20, 1999** |

I, Steven L. Mayer, declare:

**PROFESSIONAL BACKGROUND**

1. I am a member of the State Bar of California. I attended law school at Yale Law School and Boalt Hall. After graduating from the latter in 1974, I served as a staff attorney for the United States Court of Appeals for the Ninth Circuit during 1974-75, and became an Assistant Supervising Staff Attorney in 1975. I held that position until November, 1975, when I joined the firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A **[ER 1843]** Professional Corporation, as an associate. While in law school, I became a member of the Order of the Coif. I became a partner (director) at the Howard, Rice firm in 1980.

2. I have specialized in appellate practice for the past twenty-one years. I am a Specialist in Appellate Law certified by the State Bar of California Board of Legal Specialization. From 1996 to 1998, I was the Chairman of the Appellate Practice Section of the Bar Association of

San Francisco. From 1995 to 1998, I was a member of the Appellate Courts Committee of the State Bar of California. I am also a member of the California Academy of Appellate Lawyers. I have been admitted to practice in all of the federal district courts in California, including the Southern District, as well as the Ninth Circuit and the United States Supreme Court.

3. During almost twenty-five years of practice, I have litigated numerous attorney's fees claims, for both plaintiffs and defendants. I defended against fee claims in *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); *Laurel Heights Improvement Association v. Regents of the University of California*, 47 Cal. 3d 376 (1988); *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128 (1998); and *Mount Sutro Defense Committee v. Regents of the University of California*, 77 Cal. App. 3d 20 (1978). I have settled attorney's fees claims on behalf of plaintiffs in several other cases, including *Gardiner v. City of Berkeley* (Alameda County Superior Court, No. 562826-7) and *Whistler v. Stonestown Corp.* (San Francisco Superior Court, No. 884129). **[ER 1844]**

4. I have also been involved in numerous attorney's fees cases as an expert. A declaration I gave concerning the effect of contingency risk on hourly rates under then-existing federal law was cited with approval by the Ninth Circuit in *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1988). A similar declaration I gave in *Gates v. Deukmejian*, Civ. No. S-87-1636 LKK, Eastern District of California, was cited by Judge Karlton in his Order awarding fees to plaintiffs in that case. Another declaration concerning hourly rates was cited by the District Court in *White v. City of Richmond*, 559 F. Supp. 129, 132 (N.D. Cal. 1982), *aff'd*, 712 F.2d 458 (9th Cir. 1983). I was also deposed as an expert on attorney's fees issues in two matters: *White v. City of Richmond*, 559 F. Supp. 129 (N.D. Cal. 1982), *aff'd*, 712 F.2d 458 (9th Cir. 1983), and *USA v. City and*

*County of San Francisco*, Nos. C 84-7089 MHP and C 84-1100 MHP, Northern District of California.

5. In the twenty years that I have been a partner at Howard, Rice, I have reviewed bills for my clients and the clients of my partners. I review approximately ten bills every month. While the bills vary in size, depending on the amount of time spent on a particular matter during that month, I have reviewed numerous bills that invoice $50,000 or more during a single month. With respect to all bills that I review, whether for myself or my partners, I exercise billing judgment with respect to both the amounts billed and the description that appears on the invoice. I also testified as an expert regarding billing practices in the White case mentioned above. **[ER 1845]**

6. During my almost twenty-five years of practicing law, I have specialized in representing public entities. I have represented literally scores of counties and cities, in dozens of litigation matters. The billing standards that I discuss in this declaration are equally applicable to public and private clients alike.

7. I have read every pleading filed in this action concerning plaintiff's claim for attorneys' fees.

**SUMMARY OF OPINIONS**

8. Based on this review, I have reached the following conclusions. First, I believe that the time spent by plaintiff's counsel in connection with the fee motion was reasonable. Second, I believe that defendants are wrong in asserting that the descriptions of the work performed plaintiff's counsel contained in their time records are vague. Third, I believe that plaintiff's counsel cannot be faulted for combining several related tasks in a single time entry.

## DETAILED OPINIONS

### A. The Time Spent By Mr. Chesebro in Connection With the Motion For Attorney's Fees Was Reasonable

9. To assist my review of the reasonableness of Mr. Chesebro's time, and that of his co-counsel Louis E. Goebel, Mr. Chesebro prepared a breakdown, which divides the time spent after March 20, 1999, into work on the merits and work on the various stages in the litigation over the fee claim. I believe the hours spent were reasonable, for the reasons that follow. **[ER 1846]**

(a) Plaintiff is claiming a total of 17.0 hours for work related to the merits of this case in March and April, 1999 ("Merits Stage 10"). The time was spent preparing for oral argument relating to several substantive post-trial motions, conducting oral argument on the motions and meeting with the plaintiff. This time was reasonably spent, particularly considering that the motions were substantial and resulted in obtaining $34,145.54 in additional relief to plaintiff in the form of prejudgment interest.

(b) The first stage of the fee motion ("Fee Stage 1")involved preparation of the motion for attorneys' fees and the supporting pleadings, and involved a total of 41.28 hours. This time was reasonable. To prepare a motion for attorney's fees on behalf of two lawyers with different practices in a case that had gone on for more than six years and resulted in two rounds of appeals in approximately a week of attorney time is quite efficient. Moreover, as Mr. Chesebro's reply declaration states, he and his co-counsel took numerous affirmative steps to minimize the time spent on the fee motion, in fairness to the defendants who would ultimately be liable for any "fees-on-fees."

(c) The second stage of the fee litigation ("Fee Stage 2") involved responding to requests for information by the Court and defendants during March and April, 1999. This involved a total of 60.12 hours. Much of this time was spent responding to requests for information by the Court concerning "the reasonableness of the claimed attorneys' fees in both federal and state courts"; the "hourly rates charged in the San Diego legal community and the Ninth Circuit at large"; and "prior awards of attorneys' fees **[ER 1847]** requested or granted in the San Diego legal community." Scheduling Order (April 6, 1999) at 1. In view of the breadth of these requests (which included information on billing rates not only in San Diego but throughout the Ninth Circuit), the amount of time spent was reasonable. Moreover, during this time period, at the Court's direction, plaintiff also submitted a memorandum of law supporting the fee request, which had not been done when the initial request was filed.

(d) The next stage of the fee litigation ("Fee Stage 3") involved a total of 76.51 hours spent preparing plaintiff's response to the memorandum opposing the fee request filed by the County. This involved the preparation of reply affidavits by both of plaintiff's counsel, as well as two separate reply memoranda addressing the separate fee requests of Mr. Goebel and Mr. Chesebro. In particular, the reply declaration that Mr. Chesebro filed, which is over 40 pages in length, had to address a scattershot array of dozens of objections filed by the County in response to plaintiff's fee request covering Mr. Chesebro's time, including challenges to approximately 85% of the hours put in by Mr. Chesebro and those working under him. In view of the number and breadth of defendants' objections to plaintiff's fee motion, and the amount at stake, the time spent preparing the reply papers was reasonable.

(e) The next stage of the fee litigation ("Fee Stage 4") involved 43.67 hours from July through September, 1999. The time spent was primarily devoted to preparing for oral argument ordered by the Court and complying with numerous orders by the Court requiring Mr. Chesebro to submit additional information **[ER 1848]** (which were issued on July 21, 23, August 27, and September 3, 1999). Among other things, the information requested concerned payments made to law students working on this case; payments made to various contract attorneys and legal assistants; and Mr. Chesebro's communications with the plaintiff regarding attorney's fees. Having worked on numerous attorney's fees matters myself, I can state with assurance that it would have been extremely unusual for Mr. Chesebro to include any of this information in his original fee application. The time spent providing the information requested by the Court should therefore logically be paid by defendants as part of their general liability for fees-on-fees.

(f) The next stage of work on the fee proceedings ("Fee Stage 5") involved the preparation of plaintiff's motion for reconsideration of the Court's September 29, 1999, fee order. Most of this time, which totaled 127.48 hours, involved preparing numerous declarations filed in support of the motion. There were nine such declarations, each of which addressed a different facet of the Court's prior ruling. For example, the declaration of Professor Laurence Tribe covered numerous issues, including the attorney's fees settlement in *Meilicke v. County of Los Angeles*, which the Court had discussed in its original attorney's fees order; Mr. Chesebro's customary hourly rates; and the lack of attorneys in San Diego with qualifications comparable to Mr. Chesebro. In my judgment the time spent preparing the motion for reconsideration and the supporting declarations was reasonable. The Court's September 29 order raised numerous issues that had not been addressed by the parties, all of which reflected the

District Court's adverse reaction to various facets of plaintiff's fee claim **[ER 1849]** and, in particular, the qualifications, competence and honesty of Mr. Chesebro. These issues included: the time spent by Mr. Chesebro on the *Meilicke* case; the normal hourly rates billed and collected by Mr. Chesebro from clients other than plaintiff; and the qualifications of Mr. Chesebro as compared with those of several attorneys in the San Diego area identified by the Court. Because the Court's order implicitly challenged Mr. Chesebro's credibility with respect to several of these matters (*e.g.*, his work on the *Meilicke* case and his normal hourly rates), Mr. Chesebro was forced to obtain declarations from third parties confirming his prior statements in sworn declarations regarding these issues, even though his own sworn statements should have been sufficient absent a showing by defendants (which defendants never even attempted to make) that these statements were false. Moreover, the need to make a strong showing in support of the motion for reconsideration was also dictated by appellate strategy. For purposes of appeal, plaintiff could not afford to leave unchallenged the statements contained in the Court's September 29 order that reflected adversely on his fee claim and his counsel.

(g) Plaintiff's counsel spent 90.51 hours preparing a reply to plaintiff's opposition to the motion for reconsideration ("Fee Stage 6"). Since defendants' opposition to that motion, for the first time, questioned Mr. Chesebro's contribution to plaintiff's victory in this case, and argued through an expert declaration that Mr. Chesebro's expertise in constitutional litigation was not necessary to plaintiff's victory, Mr. Chesebro understandably saw the need for plaintiff to hire an expert to respond. That time, and the associated expense, was reasonable. **[ER 1850]**

(h) In my judgment, the number of hours devoted to the fee litigation was large, but not unreasonable. The number of hours is attributable to the piecemeal manner in which the fee request was adjudicated, with the Court continually requesting information on new issues not addressed in the parties' memoranda and/or raising new issues *sua sponte*. The fact that plaintiff's counsel in this case were forced to assemble new information in response to the Court's requests, when no reasonable attorney would have submitted such information in preparing his or her initial pleadings, does not indicate an excess of effort by plaintiff's counsel.

(i) Defendants object to dozens of entries in the time records of plaintiff's counsel as unreasonable. These objections are frivolous. For example, defendants do not explain why it should have taken less than six hours for Mr. Chesebro to review more than six years of billing records, covering in excess of 1000 hours of time, for accuracy and reasonableness (March 28, 1999), nor do they explain why plaintiff should have talked for less than three-quarters of an hour with his counsel on the following day. Such nit-picking ignores the reality of what happens when a client hires a lawyer: not to do specific research on a particular issue, or to have a phone call on a particular day on an individual subject, but to accomplish a particular overall result in a reasonable amount of time. The only way to measure the reasonableness of time is to look at the overall circumstances of the litigation, the number and complexity of the issues, the burdens imposed by the Court and the opposing parties, and the **[ER 1851]** amount at stake, and to arrive at an overall judgment as to whether the time was reasonably spent. In my judgment, considering all the facts surrounding this fee application, the time spent was reasonable.

**B. Mr. Chesebro's Time Descriptions Are Reasonable**

10. In their opposition to plaintiff's motion, defendants object to fifteen entries in the time records of plaintiff's counsel on the ground of vagueness. I have reviewed these entries and believe that defendants' objections are meritless. In all but one instance (the entry for April 5, 1999), where legal or factual research has been performed, the subject of that research has been indicated. For example, entry No. 1 lists "Research on interim fee awards"; entry No. 9 describes "more research into Gray Cary qualifications"; entry No. 11 describes "more research on need to avoid second major litigation; need to use legal framework that avoids perverse incentives"; and entry No. 15 describes "Research on final judgment rule w/r/t appeal of case."

11. In my opinion, it is sufficient for a lawyer to indicate the general subject of his or her research in a time entry; there is no need to identify the precise issue (or sub-issue) being researched. After all, most clients are not lawyers, and they do not care whether an hour spent was devoted to Issue A or Issue B; what matters is the overall amount of work performed in relation to the overall task at hand. For this reason, I believe that the entries in Mr. Chesebro's time sheets that do not describe the particular issues researched on a given day (e.g., the April 5, 1999 entry for "further research at USD on attorney fees" and the **[ER 1852]** October 9, 1999 entry for "research into 9th Cir. and Southern District precedents") to be acceptable.

12. The same is true for the other purportedly vague entries that do not describe legal research. Such entries as "collect, review and transmit descriptive listing of cost[s] claimed" and "work on new discovery order" contain more-than-adequate descriptions of the tasks performed.

### C. The "Clustered Entries" in Mr. Chesebro's Time Records Are Reasonable

13. Defendants also object to numerous entries on Mr. Chesebro's time records on the ground that they "impermissibly cluster descriptions of work performed." Again, it is my opinion that this objection is meritless.

14. In the first place, the legal marketplace has never imposed a prohibition on "block" or "cluster" billing. While clients expect that all the work each attorney does in a particular day be itemized on an invoice, there is no requirement that the amount of time devoted to each individual task be detailed. Thus, while I have had a few clients over my twenty-five years of practice who have insisted on an individual time entry for every single task performed, the number of such clients is minuscule, totaling less than five over a period of twenty-five years of practice. Again, the reason is simple. Most clients simply are not interested in how much time it takes an attorney to perform every single individual task connected with their representation; instead, most clients understandably focus on the overall time spent, the tasks performed, and the relationship between the two.
**[ER 1853]**

15. There are no considerations unique to the attorney's fees process in civil rights cases that make cluster billing inappropriate as a matter of course. In some cases, such as where a fee-generating claim is being litigated simultaneously with a non-fee claim, an attorney may be required to segregate out the time attributed solely to work performed on a non-fee generating claim, so that that work can be isolated and deducted from the calculations used to support a fee motion. However, such considerations do not apply to a motion for "fees-on-fees," because <u>all</u> of an attorney's time reasonably spent on a fee application is compensable.

16. Moreover, breaking up clustered time entries into individual entries is particularly senseless when all the entries are related to a particular task. For example, when an attorney files a motion in federal court, he or she typically prepares several documents, including a notice of motion and motion, a memorandum of points and authorities, and one or more supporting declarations, each of which may have exhibits attached. Typically, attorneys prepare these documents simultaneously, since all must be filed together and each relates to the others. Changes in a declaration, for example, may necessitate changes in a memorandum that relies on the declaration. Consequently, it is pointless, as well as burdensome, to insist that attorneys segregate the time involved in these tasks into individual entries that relate to each particular document. **[ER 1854]**

17. An example of simultaneous work on related documents can be found in Mr. Chesebro's time entry for March 29, 1999, for six hours. That entry reads as follows: "Final work on affidavit, checking/proofreading time records, offering suggestions on Goebel affidavit; various t/c with Goebel and staff; drafted notice of motion and motion; faxed to Goebel's office for filing." Thus, in the course of these six hours, Mr. Chesebro worked on his own affidavit, his time records, Mr. Goebel's affidavit, and the notice of motion and motion. It would be foolish and burdensome to require Mr. Chesebro to allocate these six hours minute-by-minute to each individual task. The same is true for the entries dated March 23, March 26, March 27, and April 5, 1999, as well as all the entries listed by the County on page 13 of its opposition. **[ER 1855]**

The facts set forth herein are true and correct of my own personal knowledge. If called upon to do so as a witness, I could and would competently testify thereto.

Pursuant to 42 U.S.C. §1746, I declare under penalty

of perjury that the foregoing is true and correct. Executed this 10th day of May, 2000, in San Francisco, California.

/s/
STEVEN L. MAYER